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JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE  
HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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VOLUME XII

INSTITUTIONAL AND ECONOMIC HISTORY

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## TABLE OF CONTENTS.

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	PAGE
I-II. The Cincinnati Southern Railway: A Study in Municipal Activity. By J. H. Hollander. With a Memorial of Dr. Lucius S. Merriam . . . . .	7
III. The Constitutional Beginnings of North Carolina (1663-1729). By J. S. Bassett . . . . .	105
IV. The Struggle of Protestant Dissenters for Religious Toleration in Virginia. By H. R. McIlwaine . . . . .	175
V-VI-VII. The Carolina Pirates and Colonial Commerce (1670-1740). By S. C. Hughson . . . . .	241
VIII-IX. History of Representation and Suffrage in Massachusetts (1620-1691). By G. H. Haynes . . . . .	377
X. English Institutions and the American Indian. By J. A. James . . . . .	467
XI-XII. The International Beginnings of the Congo Free State. By J. S. Reeves . . . . .	527



I-II

THE CINCINNATI SOUTHERN RAILWAY  
A STUDY IN MUNICIPAL ACTIVITY





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TWELFTH SERIES

I-II

THE CINCINNATI SOUTHERN RAILWAY  
A STUDY IN MUNICIPAL ACTIVITY

By J. H. HOLLANDER,  
*Fellow in Economics, Johns Hopkins University*

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A DISSERTATION PRESENTED TO THE BOARD OF UNIVERSITY STUDIES OF  
THE JOHNS HOPKINS UNIVERSITY FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY.

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# CONTENTS.

	PAGE
I. INTRODUCTORY . . . . .	7
II. THE NECESSITY OF THE RAILWAY . . . . .	10
Commercial Development of Cincinnati, 1830-1850 . . . . .	11
Inauguration of Railroad Transportation . . . . .	13
Agitation for a Southern Railway . . . . .	14
Cincinnati in 1868 . . . . .	17
Suggestion of Municipal Construction . . . . .	18
Ferguson Bill . . . . .	20
III. LEGISLATION AND LITIGATION . . . . .	22
Passage of Ferguson Act . . . . .	23
Appointment of Board of Trustees . . . . .	24
Legislation in Tennessee . . . . .	25
Walker <i>vs.</i> Cincinnati . . . . .	27
Legislative Struggle in Kentucky . . . . .	29
Adjudication of Supreme Court of Ohio . . . . .	31
Preliminary Surveys . . . . .	33
IV. THE CONSTRUCTION OF THE RAILWAY . . . . .	35
Delay in Legislation . . . . .	35
"Completing and Leasing" Theory . . . . .	36
Financial Crisis of 1873 . . . . .	36
Negotiation of Loan . . . . .	37
Prosecution of Work, 1874-1876 . . . . .	39
Exhaustion of Funds . . . . .	41
Amendment of "Six Million" Act . . . . .	43
Local Operation of Railway . . . . .	44
Passage of "Two Million" Act . . . . .	46
Completion of Railway . . . . .	49
V. LEASE AND OPERATION . . . . .	50
Inadequacy of Operating License . . . . .	50
Cincinnati, New Orleans and Texas Pacific Railway Company (lessee) . . . . .	51
Significance of Receivership . . . . .	53
Terminal Facilities . . . . .	54
Arbitration Case . . . . .	56
Extension of Lease . . . . .	57

	PAGE
VI. A REVIEW OF THE TRUST . . . . .	60
Municipal Construction . . . . .	60
Validity of Legislation . . . . .	61
Selection of Trustees . . . . .	62
Negotiation of Bonds . . . . .	64
Award of Contracts . . . . .	66
"Completing and Leasing" Theory . . . . .	68
Influence of Public Sentiment . . . . .	69
Cost and Character of Construction . . . . .	71
Final Lease . . . . .	72
VII. MUNICIPAL RESULTS . . . . .	74
Growth of Municipal Indebtedness . . . . .	74
Relation to Tax Levy . . . . .	75
Financial Possibilities . . . . .	76
Commercial Influences of Railway . . . . .	79
(a) Distributive Interests . . . . .	81
(b) Productive " . . . . .	83
(c) Transportation " . . . . .	85
(d) Industrial Spirit . . . . .	85
Future of the Railway . . . . .	87
APPENDIX . . . . .	89
A. Text of Ferguson Act . . . . .	89
B. Letter of Judge Cooley . . . . .	92
C. Bibliography . . . . .	94

# THE CINCINNATI SOUTHERN RAILWAY

## A STUDY IN MUNICIPAL ACTIVITY.

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### I.

#### INTRODUCTORY.

The municipal construction of a railroad several hundred miles in length, extending through a series of States, and involving the expenditure of many million dollars and a long period of time, is as anomalous as it is remarkable. A characteristic of American city administration has been the limited scope accorded public activity. The material conditions under which urban development in the United States has taken place are in large measure responsible for this state of affairs. Yet careful analysis will disclose important indirect influences, as the political philosophy of the period, the *laissez-faire* doctrines of the classical political economy, and the reaction against internal improvements in the United States. The stress of changed conditions within the present decade has tended to enlarge the scope of municipal activity, and made further expansion in the near future likely. Without urging a larger resort to public agencies as the panacea for all municipal ills, it seems clear that, with the growth of the American city in area and population, with the continued influx of foreign elements into an already congested mass, with a keener consciousness of social conveniences and responsibilities, all contributing to a new complexity of municipal life,—the assumption by the city of many functions new in kind and degree may be expected. It is this fact which renders any exercise of wide municipal activity in the United States of particular interest. European

experience in local administration offers a rich field for suggestion and instruction. Yet we are continually reminded that local self-government, a professional civil service or a qualified suffrage present fundamental conditions essentially different from those about us, and that it is from our own experience, unfortunately fragmentary and inadequate, that the first lesson is to be drawn.

Aside from the general interest attaching to the Cincinnati Southern Railway as an exercise of wide municipal activity, the particular conditions which compelled municipal construction are noteworthy. The necessity of some central control of local administration "to insist on the discharge of certain functions, to prevent the undue extension of others, and to protect the interests of individuals against the encroachments of local authorities," follows from the very nature of local government.<sup>1</sup> Particularly with regard to financial matters is this true. Local borrowing is at best "an agreeable process," whose evil effects are only seen reduced through the vista of time. When extravagant social and industrial improvements are regarded as essential to municipal development, when a controlling influence in municipal affairs is exerted for unworthy ends, or by persons having no material interests at stake, the desirability of regulation becomes more apparent. In England, France and Prussia, the local borrowing power has been subjected to central discretionary supervision and limitation. In the United States, the control over local administration, inherent in the State and exercised by ordinary legislation and by the grant and amendment of charters, has been supplemented by the insertion of restricting clauses in the written constitution. This attempt to introduce rigidity and uniformity where elasticity and variety are essential, has been unsatisfactory. In some cases, as where specific local legislation is prohibited, or where the municipal rate may not exceed a fixed per centum of the taxable basis, easy devices have been found

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<sup>1</sup> Bastable, *Public Finance*, pp. 120-121.

to evade the spirit of the restriction. In other instances, the end denied has been attained only by means more hazardous than that proscribed. The power whose exercise is prohibited is ordinarily one that has been subject to grave abuse, and with regard to which, the wisdom of strict control is obvious. It may, however, well be doubted whether a rigid general enactment, legislating for all times and all conditions, offers the proper remedy. Certainly the history of the Cincinnati Southern Railway affords forcible illustration of the danger to which, with the marked variety and quick change of modern industrial life, a local body may by such a limitation be exposed.

## II.

## THE NECESSITY OF THE RAILWAY.

During the early decades of the present century, Cincinnati was the most important commercial center of the West. In 1820, Chicago had not yet come into existence, St. Louis was a mere trader's settlement, and Louisville a modest town of some four thousand inhabitants. The traffic of the entire region drained by the Mississippi river and its tributaries was transported by water, and Cincinnati was practically the only market in which the surplus products of the South and West could be exchanged for eastern and northern manufactures. The application of steam to river navigation in the decade between 1820 and 1830 greatly strengthened and developed these natural advantages. Louisville and St. Louis rose about the same time to commercial importance, but their competition only served to stimulate the growth of the older city. Population increased from 9,642 in 1820 to 161,044 in 1860, and remained throughout this entire period the largest of any city west of the seaboard.<sup>1</sup> Commercial relations extended from Pittsburgh to Fort Benton, Montana, and from St. Paul to New Orleans. Particularly with the South, as a result of advantageous location and intimate acquaintance with the tastes and habits of southern merchants, a large and profitable business was enjoyed.

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<sup>1</sup>The population of the four cities, as shown by the several census reports, was as follows :

	1820	1830	1840	1850	1860	1870
Cincinnati	9,642	24,831	46,338	115,435	161,044	216,239
Chicago	—	70	4,470	29,463	112,172	298,977
St. Louis	—	5,862	16,469	77,860	160,773	310,864
Louisville	4,012	10,341	21,210	43,194	68,033	100,753

See *Report on Internal Commerce and Navigation of the United States*, 1880, p. 73.



Recognizing that the natural empire of trade lay in this direction, clear-headed Cincinnati merchants early urged the improvement of existent means of communication. Already in 1835, five years after the feasibility of steam locomotion had been demonstrated, a public meeting was held for the purpose of considering the subject of railway transportation between Cincinnati and the cities of the South Atlantic. An active part was taken in the agitation which, in the following year, secured the charter of the Cincinnati, Louisville and Charleston Railway, and a memorable event in early municipal history was a wonderful illumination of the city, amid falling snow, in February, 1836, in celebration of the grant of right of way to this road by the Legislature of Kentucky. Cincinnati sent a strong delegation to "the great southwestern railroad convention," held in furtherance of the project in Knoxville, in the following July, at which delegates were present from Indiana, Ohio, Kentucky, Virginia, Tennessee, Georgia, Alabama, South Carolina, and North Carolina, and over which Governor Hayne of South Carolina presided. The proposed road was here endorsed, and a route selected from Charleston, South Carolina, along the French Broad through Cumberland to Cincinnati. The Kentucky charter required the construction of branch roads from some point in the southern portion of the State to Maysville and Louisville. This burdensome condition delayed the commencement of work until the financial crash of 1837, when, under the general industrial and financial depression, the project, with all that it promised, was for the time abandoned. Agitation for a southern railroad was renewed at intervals in Cincinnati during the next fifteen years. The constitution of Ohio permitted special acts of legislation authorizing cities, towns or townships to become stockholders in private corporations, and in the general spirit of the period, encouragement was given to various unsuccessful railroad companies organized for the purpose of providing direct access to the South.

By the year 1850, the reaction against public works in

Ohio had fairly developed. The State debt at that time amounted to over eighteen millions of dollars, and "as business enterprises both the public works and the private concerns aided by the State were failures."<sup>1</sup> The abuses of rash wild-cat speculations made in the mad fever for internal improvements by cities and counties throughout the State had grown very serious. Most of the stock so subscribed had become utterly worthless, and the greatest difficulty was experienced in the assessment and collection of the heavy taxes necessary to meet the bonds by which the subscriptions were paid. Legal processes had repeatedly to be employed, counties attempted repudiation, and the public credit was greatly shaken.<sup>2</sup> The general situation was so ominous that the Constitutional Convention which met in 1850 not only prohibited State aid of any kind to public works, but inserted, by a decisive vote of 78 to 16, the following clause in the new document:<sup>3</sup>

Art. VIII. Sect. 6.—"The General Assembly shall never authorize any county, city or township, by vote of its members or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to or in aid of such company, corporation or association."

The insertion of this clause definitely removed the possibility of Cincinnati securing railroad connection by subscription to any private enterprise.

In the meantime, the local necessity for improved means of communication with the South had grown in urgency. Commercial supremacy in the West and Northwest departed from Cincinnati with the inauguration of railroad transportation in the valley of the Mississippi. The area of trade was

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<sup>1</sup> Charles N. Morris, *Internal Improvements in Ohio*; in *Papers of the American Historical Association*, vol. iii., p. 107.

<sup>2</sup> *Walker vs. City of Cincinnati*, 21 Ohio St., 14.

<sup>3</sup> Poore, *Charters and Constitutions*, ii., p. 1473. For the long and interesting debate which preceded its adoption, see *Debates of Constitutional Convention of Ohio*, 1850-51, ii., p. 300 *et seq.*

greatly enlarged, but the number of competing points more than proportionately increased. Three distinct lines to the sea-board brought in New York, Philadelphia, Baltimore and Boston as active competitors for trade north of the Ohio river. The Chicago and Rock Island Railroad, with connections completed in 1854, gave Chicago access to the north-western region of Dakota, Nebraska, Minnesota, and Iowa. St. Louis reached out in all directions, increasing connecting mileage in Indiana, Illinois, and Missouri from 339 miles in 1850 to 4186 miles in 1856.<sup>1</sup> Cincinnati responded to this general movement by active railroad construction and extension. The mileage of Ohio grew from 299 miles in 1850 to 1869 miles in 1856.<sup>2</sup> But the exclusive advantages that had existed with respect to water transportation no longer prevailed. The closer proximity and momentum of growth of the new cities, the ease of railroad construction in the West, more than compensated for the advantages of established industries and defined lines of trade.

In the South, Cincinnati retained a dominating position for some years longer. Railroads constructed during the early part of the decade were largely tributary to river transportation, or local lines offering little competition to river traffic. In 1859, however, the Louisville and Nashville Railroad was opened for through travel, and Louisville, the most active competitor of Cincinnati for Southern trade, was placed in direct communication with Nashville, thence by connecting roads, with Knoxville, Chattanooga, Memphis, Augusta, Charleston, and almost every important point in the South. The superior rapidity and regularity of railroad transportation at once asserted itself, and a steady deflection of traffic from the river to the railroad, that is, from Cincinnati to Louisville, set in.

The graver aspect of the situation now engaged general

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<sup>1</sup> *Internal Commerce of the United States*. 1882 : Appendix, p. 235.

<sup>2</sup> *Report of Secretary of State of Ohio*, 1880, p. 625. The greater part of this was directly tributary to Cincinnati.

attention. Efforts were renewed to secure the construction of an independent Southern railroad by private enterprise, but without success. It was a period of quick active speculation, with abundant opportunities for secure investment and immediate returns. The length of the proposed road, the unusual topographical difficulties of the route, the probable cost of construction, the slow development of local traffic, the certainty of bitter competition from an intrenched corporation, and the necessity for practically completing the line before profitable connections could be secured, presented difficulties to outside capital which the obvious local desirability of the road could not overcome. Various propositions were suggested to evade the constitutional prohibition of municipal aid, but these were one after another demonstrated impracticable.

In 1859, an attempt was made to stimulate private enterprise by the offer of a cash bonus to be raised by individual subscription. After some negotiation, the Cincinnati, Lexington and East Tennessee Railroad, in operation from Lexington to Nicholasville, Kentucky, proposed to extend its rails to Knoxville, Tennessee, upon the condition that the sum of one million dollars should be so provided. The Kentucky Central Railroad was already in operation between Cincinnati and Lexington, and the proposed extension would practically give Cincinnati an independent line into the heart of Southern territory. The offer was conditionally accepted, and subscription lists circulated. Many persons, whether convinced of the futility of the project, or believing that the necessary amount would be raised independently, failed to respond as expected, and after a little more than half of the entire sum had been secured, no further progress was made. Modifications of the original plan were suggested, but before anything could be accomplished the muttering of the approaching civil storm had diverted public attention in other directions, and all agitation was abandoned.

During the war the absence of a Southern railroad was keenly felt. A direct line connecting Cincinnati with some

commanding point in the South, appeared so obviously necessary to successful military operations that one of the early messages of President Lincoln to Congress urged its construction.<sup>1</sup> Surveys were ordered by General Burnside, and lines run by Mr. W. A. Gunn, of Lexington, Kentucky, from Nicholasville, south to the Cumberland river.<sup>2</sup> Somewhat later a draft of negroes was actually made for the preparation of grades. No immediate action was, however, taken by Congress, and in the excitement of immediate developments the enterprise was allowed to drop. But for the failure of local representatives to press the President's recommendations upon Congress, and the abandonment of the projected advance against Cumberland Gap, it is probable that the construction of a Southern railway would have been at least undertaken by the national government.<sup>3</sup>

The commercial interests of Cincinnati suffered much from the events of the war. Trade with the Southern States was practically cut off, and manufacturing and commercial interests were paralyzed. The demand for military supplies later developed feverish activity in certain industries, but the stimulus was artificial, and its evil effects were felt in the reaction which followed the close of the struggle. When business interests returned to normal development with the revival of the prostrate industrial life of the South, it appeared that the four years of strife had firmly established the deflecting tendencies of the preceding period. Just as the rich stream of immigration had been diverted from the valley of the Ohio to the fertile region of the Northwest, so the new channels of trade, which the dawning revolution in means of transportation had indicated, were now permanent and predominant. By 1868, the general traffic of the North

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<sup>1</sup> *Congressional Globe*, Dec. 3, 1861: Appendix, p. 1.

<sup>2</sup> Mr. Gunn was subsequently appointed Chief Engineer of the Cincinnati Southern Railway and directed the preliminary surveys made for this purpose. The line, as finally located, included a portion of the earlier military survey.

<sup>3</sup> Cf. Nicolay and Hay, *Abraham Lincoln*, v., pp. 66-67.

and West had passed from Cincinnati to the new cities of the Mississippi and the Lakes,—St. Louis, Chicago, Cleveland, Toledo, and Indianapolis.

A no less critical situation was developing in the South. Years before a Southern railway had been urged as an advantageous outlet from the Ohio river to the southeastern seaboard. Such was the plan of the Cincinnati, Louisville and Charleston Railway, and the significance of the agitation of 1835-6. But now the situation had changed. Cincinnati reached the seaboard through New York, Philadelphia, and Baltimore, and sought southern territory for its own sake. Moreover, throughout the South, the river had definitely yielded to the railroad. Two large systems of railroads, embracing some 4000 miles, had grown up,—the one extending from the southeastern seaboard in a northwesterly direction, the other bearing from the southwestern Gulf cities toward the northeast, and converging with the former in eastern Tennessee. Louisville tapped this network by means of the Louisville and Nashville, and the Nashville and Chattanooga railroads at the precise juncture of the two branches, Chattanooga, Tennessee.

The only connection of Cincinnati with the South, aside from the all-water route, was by river to Louisville, thence *via* Nashville and Chattanooga by the Louisville and Nashville Railroad. As a means of transportation in competitive trade, it was both indirect and inadequate. Shipments to a distributing point due south from Cincinnati, as Chattanooga, described a wide circuit, going successively west, south, east, and north. The legitimate difference in freight charges, other things being equal, tended to swell the stream of Louisville trade at the expense of that of Cincinnati. The Louisville and Nashville Railroad was moreover, at that time, "a Louisville road," controlled by, and operated in the interests of Louisville merchants. Rail rates between Cincinnati and local points were made by adding the rate between Cincinnati and Louisville to the rate between Louisville and those points. Between Cincinnati and competitive

points, the rates were formed by adding an arbitrary charge between Cincinnati and Louisville to the rate from Louisville to such points.<sup>1</sup> The facilities of the road for shipments from Cincinnati to Southern points were entirely inadequate. Through freight was delayed in Louisville, and merchants still tell of pork destined for this section, unladen at Louisville and piled up for days outside of the city. For several years the Board of Trade of Cincinnati maintained a special agent at Louisville to trace out and hurry through Southern consignments.

The disadvantages thus indicated were emphasized by the radical changes in business methods which the economic revolution in the South had effected. Formerly the needs of a large portion of the population had been uniform and supplied by the planter, who purchased his stores in the larger Southern cities and retailed them to his body of dependents. Now, however, the negro bought for himself where and what he wished. General merchandise stores sprang up at every cross-road, and Southern merchants poured into Northern centers ready to buy for cash or on short time larger and more varied supplies.<sup>2</sup> The natural tendency was for these buyers to stop off at Louisville, rather than continue for 150 miles to Cincinnati, where any advantage gained in purchase would be lost in additional freight charge and delay in transmission.

By the spring of 1868, the construction of an independent Southern railroad had passed from a matter of general expediency to one of commercial necessity. The subject was under constant discussion in Cincinnati, and various projects of more or less impracticability were proposed. The bonus plan was revived by a proposition from the Atlantic and Great Western Railroad to acquire the Lexington and Danville Railroad and extend it in connection with the Kentucky Central to a Southern center, provided that a partial

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<sup>1</sup> *Internal Commerce of United States*, 1880, p. 90.

<sup>2</sup> See *Merchant's Magazine*, vol. lvi., 1869, p. 363.

guarantee fund would be subscribed. Like the earlier attempt, this proved unsuccessful. Attention was also given to "the Dickson plan," based upon the claim that, while the State constitution forbade a municipal gift or loan to "any stock company, corporation or association," there was nothing in it to prevent such action with respect to an individual who should engage to build the road. The doubtful validity of the interpretation, and at any rate the impossibility of securing such an "individual," were soon pointed out.

The situation, to summarize, was this: Cincinnati and Louisville were active competitors for Southern trade. This trade was definitely established upon the basis of railroad transportation. Cincinnati possessed no direct railroad to the South; Louisville did. The advantages enjoyed by the former city in the era of water transportation were now held by the latter. Southern merchants dealing directly with the North were diverted from Cincinnati by the closer proximity of Louisville. The advantages of commercial traveling were minimized by inadequate transportation facilities, unreasonable delays, and arbitrary freight charges upon Southern consignments shipped *via* Louisville. Louisville, in a word, threatened to displace Cincinnati as the chief distributing point of Northern manufactures to Southern consumers. Various unsuccessful attempts had been made to secure the construction of an independent Southern road. Serious obstacles stood in the way of unaided construction by private capital; on the other hand, a specific clause of the Ohio Constitution prevented municipal aid to private enterprises, the most feasible method of securing at least its projection.

In the winter of 1868, the remarkable proposition was first broached by Mr. Edward A. Ferguson, a skilled constitutional lawyer of Cincinnati, that, failing all other means, the city should itself construct the road. Mr. Ferguson had long felt the necessity of direct communication with the South and the improbability of private enterprise establishing it. Careful study of the constitutional limitation and related judicial decisions led him to believe that, while Cincinnati was



disqualified from lending aid to private enterprise, the city was not forbidden the exercise of independent activity. The circumstances of the inception of the idea, as told by Mr. Ferguson himself, are interesting:<sup>1</sup>

"In July, 1868, I had been preparing a brief for an argument in the Supreme Court, in the case of *Hatch vs. The Cincinnati and Indiana Railroad Company*, involving the title of the company to the canal-bed, which had been appropriated for railway purposes. After the preparation of that brief I took a short vacation and went to New York City. One Sunday evening, while there, a freight agent of one of the railroads came up to certain Cincinnati merchants to give them a hint that there was to be a change of rates and that they had better hurry their shipments. This led to a talk about railway facilities at Cincinnati and about the fact that Cincinnati was losing her business; that she was being cut off from the entire trade of the Northwest; that she formerly had a large trade in Iowa, but that was leaving, or had about left her; that the great want of the city was a railroad to establish an empire of trade, and that empire of trade was the South; that was the only place for Cincinnati trade. It was lamented that, under the constitution, the city, without co-operative capacity, could do nothing toward building the road. The brief of which I have spoken had led me to consider the legal and constitutional questions which were involved in this subject of the city's building the road,—not the question so much as the case bearing upon it. I said to the gentlemen: 'You are mistaken about the constitution of Ohio; it is not as you suppose. Under the present constitution Cincinnati can do what she could have done under the former constitution.' I instanced to them the fact that

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<sup>1</sup> *Report of the Commission on the Affairs of the Trustees of the Cincinnati Southern Railway, the Management of their Trust and the Disbursement of Moneys entrusted to their Care.* Cincinnati, 1879. Testimony of Mr. E. A. Ferguson, pp. 99-100. Henceforth this report will be referred to simply as, *Report of Investigating Commission.*

while the city of Cincinnati could not own a share in the gas company, and it was not essential to her interest that she should, as she had a contract with the present gas company, who were able to furnish gas cheaper, probably, than she could make it herself, that the city could buy the gas works and become a gas manufacturer, and supply private consumers, and that the people had voted three millions of dollars for that purpose. In other words, the prohibition was against the city being a stockholder and not against accomplishing a public object out of her own means. I wound up by saying: 'I believe, when I get home, I will draw a little bill to see what can be done under the Democratic constitution.' The constitution had been spoken of as a Democratic constitution, and all the gentlemen present, I believe, were Republicans but myself. After I returned home in the fall of that year I was taken sick, and having leisure, I thought of this project, and sat down one day to see how I could draft a bill to meet the case. I roughly sketched the first section; when I had done that, I became satisfied that it could be done."

Some weeks elapsed before Mr. Ferguson prepared a satisfactory revision of the first draft of the bill. It was finally completed and given to the press on November 25, 1868. The measure was drawn in general terms, according to constitutional requirement, and entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants." Cincinnati was, of course, the only city in the State whose population reached that number.

The measure provided that, whenever the City Council of Cincinnati should pass a resolution declaring it essential to the interests of the city that a railway be provided between two designated termini, one of which should be Cincinnati, and a majority of qualified electors should have decided at a special election in favor of the construction of the railway, then the Superior Court of the city should appoint a board of five trustees, holding office during good behavior, to carry

out the object of the resolution. The board of trustees so appointed were authorized to issue bonds of such an amount and kind as might be determined, to be secured by a mortgage on the line of railway and its net income, by the faith of the city and by a tax levied annually sufficient to pay the interest and provide a sinking fund for the final redemption of the bonds. This fund should be expended in the construction of a railway with all the usual appendages, between the specified termini. For this purpose the trustees should have power to make contracts, to employ officers and agents, to acquire necessary real and personal property and franchises, to receive donations of land, money or bonds, and to dispose of the same in aid of the fund. They should keep a record of their proceedings and a full and accurate account of their receipts and disbursements, and make an annual report of the same to the City Council and whenever requested by a resolution of the same body. Compensation should be proportioned to respective services and determined by the appointing court. The trustees should not be interested either directly or indirectly in any contract relating to the railway. Whenever the city solicitor or any bondholder should have reason to believe that a trustee had failed in the faithful performance of his duty, he should apply to the appointing court for the removal of the delinquent and the appointment of a successor. A vacancy occurring in the board from any other cause should be filled in like manner. The trustees were finally empowered to rent or lease portions of the line as soon as completed, such rights to terminate on the final completion of the railway, when it should be leased on terms and conditions to be determined by the City Council of Cincinnati.<sup>1</sup>

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<sup>1</sup> For the full text of the measure in the form in which it subsequently became a law, see Appendix, A.

## III.

## LEGISLATION AND LITIGATION.

The Ferguson bill was widely circulated and generally discussed. It was favored by the commercial bodies of the city and heartily commended by the local press. Intelligent sentiment recognized the very unusual character of the plan, but urged it as an heroic measure.<sup>1</sup> A more conservative element, to whom the proposition appeared a hazardous *dernier ressort*, presented an untried alternative plan,—an amendment to the ninth article of the constitution of Ohio, so as to enable Cincinnati to lend credit to private enterprise. The Knoxville Southern Railroad was at that time contemplating a northern extension, and a liberal municipal subscription would, it was thought, secure for Cincinnati this outlet. A carefully prepared amendment was presented to the Ohio legislature immediately after that body convened in 1869, but failed of passage.

The failure of this final substitute strengthened sentiment in favor of the Ferguson plan. Formal resolutions of endorsement were adopted by the City Council, the Board of Trade, and the Chamber of Commerce. Doubt raised as to the constitutionality of the measure was allayed by eminent

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<sup>1</sup> "We are aware that many persons think city gas works, water works, and all other improvements can be more economically managed by individuals or by stock companies than by municipal or State authority, and we see no reason to doubt this is the case; but when it comes to be a matter of life or death, where our future prosperity or decay is in such scales, then extreme cases need extreme remedies; and as a skilful physician might prescribe croton oil to a patient who without its use seemed to be on the very point of death, so may we let our city authorities build and operate a Southern railway for the benefit of our citizens."—*Cincinnati Daily Times*, November 28, 1868.

legal opinion. Hon. Thomas M. Cooley, the distinguished jurist and legal authority, wrote that while the constitution of Ohio forbade cities giving aid to works of public improvement, there was nothing in it to prevent local authorities from levying taxes for the construction of a railroad, when their own agencies were employed for the purpose. Such action would be in entire harmony with the established principle and usages of local self-government. Nor did the fact that this particular railroad extended beyond Ohio vitiate the rule. The local importance of a road depends upon the local facilities it affords to travel and commerce, and not upon the question whether it is entirely within the State or not.<sup>1</sup>

In April, 1869, the Ferguson bill, with a memorial urging its passage, was presented to the General Assembly of Ohio by a joint committee of the City Council, the Board of Trade, and the Chamber of Commerce. It was introduced in the Senate and referred to the Committee on Judiciary. Conferences with friends of the measure led to the insertion of ten million dollars as the amount of the loan and 7 3-10 per cent. as the maximum rate of interest. A clause was added, significant in the later history of the railway, prohibiting the sale of bonds at less than par. The trustees were required to enter into bond in such sum as the appointing court might direct, and a taxpayer was given co-ordinate right with a bondholder of applying for the removal of an inefficient trustee.<sup>2</sup> On April 28 the bill, as thus amended, was adopted in the Senate by a vote of 23 yeas to 7 nays. It encountered no difficulty in the House, passing by a vote of 73 to 21, and on May 4, the measure became a law.

The Ferguson bill was merely an enabling act, operative upon, first, the passage by the City Council of a formal resolution, declaring the construction of the railway necessary, and designating the terminal points; secondly, upon the subsequent ratification of this resolution by popular vote.

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<sup>1</sup> For the full text of Judge Cooley's letter, *v.* Appendix, B.

<sup>2</sup> Ohio Senate Journal, 1869, p. 622.

A special committee of the City Council was immediately appointed to select a southern terminus. The respective advantages of Atlanta, Georgia, and Knoxville and Chattanooga, Tennessee, were discussed, the last-named city being, after mature deliberation, selected. On June 4 a resolution was passed, reciting the powers conferred by the Ferguson Act, and declaring it "essential to the interests of the said city of Cincinnati that a line of railway, to be named the Cincinnati Southern Railway, should be provided between the said city of Cincinnati and the city of Chattanooga." A special election was held on June 26, 1869, at which 15,435 votes were cast "for providing said line of railway," and but 1500 "against." This unanimity of sentiment stimulated subsequent proceedings. Four days later, the Superior Court of Cincinnati, upon petition of the City Solicitor, appointed a Board of Trustees, consisting of Edward A. Ferguson, the author of the act, Richard M. Bishop, ex-mayor of Cincinnati and later governor of Ohio, Miles Greenwood, William Hooper, and Philip Heidelberg,—the last three public-spirited citizens of means and influence, representing in a general way, the manufacturing, commercial and financial interests of the city. The Board was in no sense a technical body; indeed, no one of its members had, prior to his appointment, any practical experience in railroad construction. The theory of selection, in so far as theory operated, was that the variety of duties devolving upon the trust,—including the passage of complex legislation and the negotiation of large bond issues,—made it impossible to appoint a body composed exclusively of skilled engineers; that, on the other hand, the influence of but a single person of this kind upon unskilled associates would be predominant and ultimate to an undesirable degree. Accordingly, men of sterling integrity and large public spirit, enjoying unlimited public confidence, rather than experts in railroad construction, were selected for the execution of the work. The correctness or error of this policy will be discussed in another place. It is here sufficient to repeat that the composition of the Board of Trustees was, in so far, conscious and deliberate.

Before attempting the negotiation of the loan and the inauguration of actual construction, the Trustees prepared to secure enabling acts in Kentucky and Tennessee. To hasten work thereafter, an engineering department was organized, and in August, 1869, two surveying parties were placed in the field for the purpose of conducting preliminary surveys. The problem of location was unusual in the wide latitude allowed by the absence of intermediate points,—the termini Cincinnati and Chattanooga being alone fixed,—and in the willingness of the Trustees to expend any reasonable amount of time and money to secure absolutely the best route. Directness of line was the prime consideration, subject, however, to such modifications as the topography of the country and the inducements offered by counties and land-owners along the route might render desirable. Funds sufficient to meet current expenses were secured by temporary loans made with the consent of the City Council from the city treasury. The validity of this practice was affirmed in March, 1870, by a supplementary act of the General Assembly of Ohio, authorizing the City Council to advance a sum not exceeding \$50,000 to the Trustees, to be repaid upon the negotiation of the construction loan.<sup>1</sup>

Little opposition was anticipated to the grant of right of way in Kentucky and Tennessee. Whatever rivalry or unfriendliness might exist in Kentucky was hardly expected to develop in the mere legislative franchise. Tennessee was known to be strongly in favor of the road. The importance of a northern outlet for the eastern section of the State had long been recognized, and in 1866 an attempt had been made to secure a northern connection by the incorporation in Chattanooga of the Cincinnati and Chattanooga Railway. After a preliminary survey to Emory Gap, the construction of the Cincinnati Southern was broached, and this project was abandoned.

The General Assembly of Tennessee convened in the

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<sup>1</sup>67 Ohio Laws, p. 28.

autumn of 1869, and a bill granting right of way to the Cincinnati Southern Railway was at once introduced. It authorized the Board of Trustees to enter, survey, and acquire by gift, purchase or condemnation, land or portions of constructed railways, in such amount as might be necessary for the construction and maintenance of the Railway. Counties and towns along the route were empowered, upon a majority vote of the qualified electors, to donate lands or moneys in aid of the construction of the road, to an amount not exceeding five per cent. of the taxable property. The Trustees of the road were required to locate it within two years after the passage of the act and to complete it within five. The governor of the State might extend this latter period to ten years. The maximum transportation charges were fixed at thirty-five cents per 100 lbs. and ten cents per cubic foot for freight, and five cents per mile for passengers. No discrimination should be made against the citizens of Tennessee, and the legislature reserved the right to enforce these provisions by all necessary legislation. Bondholders were secured by a statutory mortgage on the road and its net income, and failure to comply with any terms of the grant involved its forfeiture. A committee of Trustees remained in Nashville while the bill was under consideration, explaining its provisions and pointing out the local advantages to be derived from the road. The measure was strongly supported by popular sentiment, and with some slight additions became a law on January 20, 1870.

On January 7, 1870, a similar bill and memorial had been introduced into the General Assembly of Kentucky and referred to the committee on railroads in Senate and House. It immediately encountered strong opposition. Not only were sectional jealousy and local pride reluctant to grant so unusual a privilege to a city of another State, but rival interests, corporate and municipal, brought powerful influences to bear in opposition.<sup>1</sup> Various modifications failed to

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<sup>1</sup> *Report of Investigating Commission*, pp. 193-194.



weaken hostility, and on March 1, 1870, the measure was defeated in the Senate, and four days later in the House. The influences that had operated were so apparent that the Board of Trustees at once prepared to renew the struggle by carrying the measure before the people of Kentucky, and making the grant of right of way a formal issue in the next legislative election. Agents were appointed in different sections of the State, and a general convention was held in the interests of the Railway at Lexington in October, 1870. Delegates were here present from many of the counties of Kentucky, as well as from Tennessee, Alabama, and Georgia. The immediate and indirect influences of the Railway were discussed in detail, and a committee appointed to arrange for public meetings throughout the State in behalf of the proposed grant. The work of agitation was actively carried on during the entire winter.

The defeat of the Kentucky bill exerted its most important influence in Cincinnati. It was the first repulse the project had thus far received, and awoke conservative taxpayers to an alarmed consciousness of the magnitude of the undertaking and the serious difficulties involved. In April, 1871, an injunction was taken out by the City Solicitor of Cincinnati, restraining the City Auditor from paying over unpaid portions of the loan of \$50,000 advanced by the City Council for the immediate use of the Trustees. The petition averred that both the original and supplementary statutes were unconstitutional, and that the advance of money was a misapplication of corporate funds and in contravention of the laws governing the same. A demurrer to the petition was filed by the Mayor and City Auditor and the Board of Trustees jointly. The questions thus arising were reserved by the Superior Court of Cincinnati, and adjourned for adjudication in general term.

On January 4, 1871, the Superior Court, having had the case under advisement for several months, pronounced the Ferguson act and the supplementary measure of March, 1870, constitutional and valid, and dismissed the injunction

proceedings. The opinion,<sup>1</sup> rendered by Judge Taft, with the concurrence of other members of the court, after reviewing the history of the case, declared that, independent of constitutional limitations, the construction of a railroad serving public interests is a proper purpose of municipal taxation. This had been repeatedly affirmed and enjoined by the courts of Ohio before 1851. If it were not so, the restricting clause of the State constitution adopted in that year would have been unnecessary. Not only could the General Assembly up to that time authorize a city to lend money or credit to a private corporation in order that it might build a needed railway, but it might empower the city to build the road directly, in which case the application of the public fund was not left dependent upon the good faith and discretion of a private corporation. The restricting clause of the new constitution plainly cut off the power of the legislature to authorize a city to do the first of these things. It did not, however, prevent a city, when empowered, from engaging in such work directly. A similar limitation had been placed by an earlier article of the same section upon the activity of the State; but the bare restriction against loaning money or credit to private companies had not prevented the State from accomplishing directly "any purpose whatever." Its power in this direction, that is, of making public improvements without the agency of a corporation, continued exactly as it had been before 1851. "We feel bound," the opinion continues, "to give a like construction to the sixth section (Article VIII.), which applies to cities. They cannot be authorized now, as formerly, to lend their funds or their credit to, or become members of, trading corporations, for any purpose whatever. But they can be authorized to expend their own funds in making necessary public improvements in the same manner and to the same extent as before the adoption of our present constitution." The fact that the proposed road was to extend beyond the city did not vitiate its character as a municipal

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<sup>1</sup> *Walker vs. City of Cincinnati*, 1 Cin. Sup. Ct. Rep. 121.

work. In subscribing to the stock of railroads reaching into other States, and in erecting public works, such as an infirmary and workhouse in Hamilton county, Cincinnati had repeatedly exercised authority beyond corporate limits. Public expediency, and not municipal confines, must determine whether a particular function is within the scope of municipal taxation. Finally, while the constitutionality of the acts appeared clear of doubt, even were it otherwise, the presumption must always be in favor of the validity of the laws enacted by the State legislature, if the contrary is not demonstrated.

Fortified by this judicial victory, the Board of Trustees proceeded to renew the struggle for necessary legislation in Kentucky. During the winter months of 1870, the State had been canvassed from end to end in the interest of the project. Public meetings had been held in many of the counties, and the favorable influence of the Railway upon the development of the resources of the State emphasized. It had been shown that all the coal used in central Kentucky was floated down the Ohio river from Pennsylvania and Ohio to Covington, and then sent by rail throughout the State, and that citizens of eastern counties were thus obliged to pay from thirty to fifty cents per bushel for fuel, while great fields lay untouched within a few hours' ride. Similarly the stock-raisers of Kentucky could only reach the South indirectly *via* Nashville, and suffered heavy loss from the longer confinement of cattle which this made necessary. Most of the meetings so held terminated in the passage of resolutions instructing local representatives in the legislative bodies at Frankfort to vote in favor of the grant of right of way.

Immediately after the Kentucky legislature assembled in 1871, a second measure, known as "the McKee bill," embodying the provisions of the previous grant, with certain minor modifications, was introduced. The measure at once became an object of contest, and the scenes of the previous year were re-enacted. Representatives from Louisville and adjacent counties, and a well-equipped lobby, bitterly opposed

the bill, while representatives of the Board of Trustees and influential citizens of Cincinnati busied themselves in its behalf.<sup>1</sup> After a legislative battle of two weeks, the bill was narrowly lost in the House by a vote of 44 to 43, and some time later in the Senate.

Local interests and sectional jealousy had now twice defeated a grant of right of way through Kentucky. Sentiment rapidly developed in favor of seeking relief by federal legislation. In anticipation of a general law regulating the construction and dimensions of bridges across the Ohio river, a special bill had already been introduced in both bodies of Congress, authorizing the construction of a bridge according to the special plans of the Trustees. A more comprehensive measure, providing for right of way through Kentucky and Tennessee, as well as the construction of the Ohio bridge, was prepared by Mr. Ferguson, and introduced in the U. S. Senate and House of Representatives in February, 1871, the last month of the congressional session. A delegation of the Trustees proceeded to Washington and testified in its behalf before the committees of both bodies. The measure was reported favorably in the House and passed by a two-thirds vote. In the Senate it failed for want of time.

The outlook was now eminently discouraging. Every alternate means had been unsuccessfully tried, and nothing remained but to persist in the original endeavor. The funds in possession of the Trustees were about exhausted. An appeal in error had been taken from the decision of Judge Taft, and was then pending in the Supreme Court of Ohio. To attempt to negotiate the bonds when their validity was gravely questioned was impossible. The surveying parties that had left Cincinnati in the fall of 1869 reached Chattanooga in March, 1871, after eighteen months of continuous field service, and were ordered to sell the field equipment and disband, only a small force being retained to work up the surveys. A large number of lines had been run and a

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<sup>1</sup> *Report of Investigating Commission*, p. 64.

thorough exploration made of a region widening out from Cincinnati to a distance of 70 miles at the Kentucky-Tennessee State line, thence converging gradually to Chattanooga. The belt of country thus enclosed formed an area equivalent to about one-third of the State of Kentucky. No route had now been considered outside this limit, as involving by excessive divergence from an air-line too great a sacrifice of directness.

In December, 1871, Chief Justice Scott, of the Supreme Court of Ohio, with the concurrence of his associates, sustained the judgment of the lower court upon the validity of the Ferguson and supplementary acts.<sup>1</sup> The general principles of the former decision were reaffirmed, with renewed emphasis upon the entire competence of the Legislature to authorize under the present constitution the municipal construction of public works. "The restricting clause of the constitution interdicts a business partnership between a municipality or a subdivision of the State and an individual or private corporation. It forbids the union of public and private capital or credit in any enterprise whatsoever. If it meant more than this, it would follow that municipal bodies are powerless to make any improvement, however necessary, with their own means and on their own sole account." It is the corporate interest of the municipality and not the location of the road which determines the right of taxation. Finally, the authority and duty to prevent an abuse of powers of taxation and assessment by municipal corporations is entrusted by the constitution to the General Assembly and not to the courts of the State. The power of the legislature to authorize local taxation cannot be judicially denied, unless on the ground that the purpose for which it is exercised is not local, and the absence of all special local interest is clearly apparent.

This opinion definitely established the constitutionality of the Ferguson act and the validity of the bonds therein

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<sup>1</sup> Walker *vs.* City of Cincinnati, 21 Ohio St. 14.

authorized. It removed the most reasonable ground of opposition to the measure, its alleged unconstitutionality.

During the summer and autumn of 1871, the Kentucky representatives of the Trustees maintained an active canvass in the interest of the road in sections where hostility was most pronounced. The Kentucky legislature reconvened in December, 1872, and the enabling measure was again introduced. Upon the advice of Kentucky friends of the Railway, the passage of the bill was left ostensibly to their care, the Trustees keeping advised by telegraph and correspondence of the exact situation. For several weeks the issue hung in doubt. Finally, on February 13, 1872, after "the most determined and positive opposition that was ever inaugurated against any bill before any legislature," a partial compromise was effected, various prejudicial amendments were inserted, and the bill passed. The general tone of the measure, in the form in which it became a law, was scant and grudging. Right of way was given, but laden with burdensome conditions. The Trustees were required to survey a specified route *via* Nicholasville and Danville, thence through Sparta, Tenn., to Chattanooga, and to submit it with other lines surveyed to popular selection in Cincinnati,—the road being located as thus determined. They were further obliged to pay into the State treasury of Kentucky, in addition to ordinary taxation, the sum of fifty cents for every passenger crossing the State and twenty-five cents for every person traveling a hundred miles within it; also one cent on every hundred pounds of through freight.

The construction of the Railway under such conditions seemed impossible. In Cincinnati, the amendment or repeal of the Ferguson act was accordingly urged, in connection with a substitute plan of purchasing the Kentucky Central Railroad for three million dollars and transferring it as a *quasi*-bonus to a syndicate of railroad capitalists, who should in return extend the line to some Southern center. A bill to this effect was actually introduced in the Ohio legislature, but through the vigorous opposition of the commercial bodies of

Cincinnati and the likelihood of the repeal of the odious provisions of the Kentucky grant, it failed of passage. The first two of the prohibitive clauses were repealed by a supplementary act in the following session of the Kentucky legislature; the third not until February 4, 1873. The measure was then accepted by the Trustees, and the "Ohio river bridge act" having already become a law, all necessary enabling legislation had now been secured.

The results obtained by the surveying parties in 1869 and 1870 were worked up during the following winter and submitted to the Trustees in an exhaustive report in March, 1873. The general character of the region to be penetrated has already been referred to as one of the chief causes of the failure of private enterprise to construct the road. It was highly unfavorable to railroad construction,—wild, unsettled, difficult of access, of extremely irregular geological formation, intersected by a wide mountainous region, and cut by three great rivers and numerous smaller streams. The absence of intermediate points, and the liberal attitude of the Trustees, led the surveying parties to examine a much larger extent of territory than is usual in railroad construction.<sup>1</sup> Three main routes, with some twenty-six variations, were presented. The stem lines were the "Eastern," the "Central" or "Military," and the "Sparta" or "Western." The "Sparta" route had only been surveyed because of the proviso in the Kentucky act. It was never seriously contemplated. The "Eastern" route, through Richmond, London, Williamsburg, and Emory Junction, penetrated a smoother country and involved easier grades and less tunneling. It had the disadvantage of greater length, and was ultimately abandoned for the "Military" route *via* Nicholasville, Somerset, Point Burnside, and Emory Junction. The three lines converged in the neighborhood of Lexington.

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<sup>1</sup> It has been said that the location of no other railway in the country has been preceded by such elaborate and varied preliminary surveys. The work consumed more than two years of time, and cost \$183,969.86. See *Report of Investigating Commission*, p. 8.

where a choice was presented between the purchase of the Kentucky Central Railroad and the acquisition of an easement over the Newport Bridge across the Ohio river, or of the construction of a direct line and an independent bridge.



## IV.

## THE CONSTRUCTION OF THE RAILWAY.

Four years had now elapsed since the passage of the Ferguson act. Necessary legislation had been secured in three State legislatures and in Congress. Extensive preliminary surveys had been made and the route of the Railway practically determined. Not a spade of earth had, however, been turned in actual construction. The results of this unexpected delay in commencing operations were most unfortunate. The negotiation of the construction bonds was delayed from a period favorable to financial operations to one highly unfavorable. Subscriptions and gifts of land promised by counties and property-owners along the route were withdrawn as the likelihood of early completion vanished, and right of way through Kentucky and Tennessee, which, it had been originally expected, would cost little or nothing, had to be acquired largely by purchase or condemnation.<sup>1</sup>

As it became apparent that the completion of the Railway would be delayed long beyond the period anticipated, and that its ultimate cost would in all likelihood exceed the amount of the original loan, the popular uneasiness which had lingered in Cincinnati crystallized into a general desire that the city should be released in so far as was possible from the burden of construction, or at least secured against further increase of municipal indebtedness. The Board of Trustees accordingly modified their original plan of constructing the Railway in entirety by the award of detailed contracts, and proceeded merely to acquire full right of way, to construct the

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<sup>1</sup>The amount actually expended for this purpose was about \$650,000. The donations received aggregated some \$50,000 in money and 3000 acres of land, estimated as worth \$350,000 additional.—*Report of Investigating Commission*, pp. 25-27, 53, 87, 189.

road-bed proper, and to provide necessary terminal facilities. Further completion was then to be secured as part consideration of the grant of an operating lease for a term of years to a private corporation. This was the "completing and leasing" theory which figures so prominently in the further history of the Railway. In the possible absence of sufficient authority in the Ferguson act to make a single contract to complete and lease, a second supplementary act was passed by the Ohio legislature in April, 1873, investing the Trustees with power "to contract for completing and leasing the whole line of railway for which they are trustees." It also granted to bondholders the statutory mortgage lien upon the Railway already conferred by the Tennessee and Kentucky acts.<sup>1</sup> On Aug. 30th, 1873, the route was definitely located on the "Military" survey,—from the Kentucky-Tennessee State line eighty miles north to a point in central Kentucky about one mile west of South Danville,—and provisionally continued down Emory river to White's Junction, along Walden's Ridge to Boyce, from where Chattanooga, five miles distant, could be reached over the tracks of the Western and Atlantic Railroad. Negotiations were at the same time begun for the purchase of the Kentucky Central Railroad and the occupation of the Newport Bridge.

The financial crash of September, 1873, and the prostration which succeeded it, made practically impossible the completion and disposition of so immense a work by a single contract. Large numbers of railroad capitalists were ruined, and confidence in railroad construction so shaken, as to necessitate the abandonment in turn of the "completing and leasing" project, and return to the original plan of detailed construction as the only possible method of procedure. In the general despondency which followed the crisis, the proposition of so continuing met with little favor. The Trustees were publicly advised to abandon the entire work, and strong private influences were brought to bear upon the author of

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<sup>1</sup>70 Ohio Laws, p. 139.

the plan to induce him to drop it. To add to the embarrassment of the moment, the Kentucky act required that actual construction be inaugurated before February, 1874, and unless the entire work was to be abandoned, it became necessary to begin operations at once,—in spite of the fact that the Trustees had no money whatever at their disposal.

After mature deliberation, the Trustees definitely decided to proceed with the construction of the Railway. Further action was prompt and vigorous. A careful review of all surveys resulted in the final location of the line already provisionally selected, extending from the Kentucky-Tennessee State line south. A tunnel, three-fourths of a mile in length, through King's Mountain was chosen for the initiation of the work. No public funds being available for the purchase of the entrances of the tunnel, four of the Trustees secured \$5000 on their personal credit, and on December 12, 1873, the first contract for excavation was awarded. Several months' negotiation having failed to effect satisfactory arrangements with the stockholders of the Kentucky Central Railroad and with the various railroads having an interest in the Newport Bridge and its approaches, the Trustees decided upon independent construction from Lexington to Cincinnati. This final location of the Railway was determined on February 12, 1874, one day before the expiration of the two years granted by the Kentucky act for the declaration of the entire route of the road.

During the three years following the passage of the Ferguson act, while the struggle for enabling legislation was in progress, no steps had been taken by the Trustees towards the negotiation of the construction bonds. Current expenses had been met by funds advanced from out the city treasury and later by the personal credit of the Trustees. In July, 1872, after the passage of the Kentucky act, a block of long-term bonds had been disposed of, but merely in sufficient amount to repay the advances made by the City Council. In the fall of the same year, a member of the Board of Trustees visited Europe and was authorized to consult foreign capitalists with

a view to further negotiations. He found the restriction of the bonds to sale at par a grave obstacle to their acceptance. The high rate of interest was considered evidence against the credit of the city, while the recent defalcation of some American railroads in interest payments operated strongly against all railroad securities, and in particular against those of so unusual a character. The spring of 1873 arrived without anything having been accomplished. Efforts were now directed to the American market. At the request of a syndicate of New York capitalists, the Trustees visited that city and conferred with representatives of the syndicate. A number of propositions were made, to the general effect of taking the entire loan at par with interest at 7 per cent. payable in gold. With gold at a premium, and the money market in a highly unsettled state, the Trustees naturally rejected the proposition, although, as the financial history of the period resulted, the terms offered were more favorable than those accepted several years later.

The panic of 1873 shattered for the time all confidence in railroad credit and forced the Trustees to again attempt placing the loan abroad. As before, however, the restriction to sale at par rendered the bonds unpopular, while the high rate of interest made capitalists wary. The recent reversal by the United States Supreme Court of the "legal tender decision" was cited as illustrative of the inconsistency of American adjudication, and renewed doubt was expressed as to the validity of the Ferguson act, despite the decisions of the Ohio courts. Finally negotiations promising successful results were broken off by anonymous letters and newspaper attacks sent by local opponents of the Railway to leading English banking houses.<sup>1</sup> This triple failure of negotiations and the imperative necessity for funds to proceed with the work, induced the Trustees to raise the rate of interest of the bonds from 7 per cent. to 7 3-10 per cent., and to make a second trial of the American market. After prolonged nego-

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<sup>1</sup> *Report of Investigating Commission*, p. 77.

tiations, embarrassed by the general prejudice against the municipal construction of the road, the uncertain prospects of its completion, and doubt as to the legal status of the loan, \$1,000,000 of bonds were marketed in May, 1874, through the American Exchange National Bank of New York, at par less one per cent. commission. Five months later, the remainder of the loan was taken through the same agency at par with time options and one and a half per cent. commission. Not until May, 1875, was the entire loan taken up and paid for. The commissions allowed for negotiation practically operated as a discount. The proceeds of the \$10,000,000 loan thus aggregated \$9,858,198.29.<sup>1</sup>

Immediately after the final location of the route in February, 1874, an efficient engineering department had been organized and active steps taken towards the award of contracts and the prosecution of the work. An engineer of distinguished reputation and wide experience was appointed consulting and principal engineer and placed in general charge of the work. He was vested with wide discretionary power, but was directly responsible to the Trustees, who exercised careful and, in so far as possible, detailed supervision over the work. The engineering department was organized into a department of surveys under a first-assistant field engineer, charged with the location of the route, right of way, and land grants; a department of construction, under a first-assistant office engineer, supervising the actual construction of the road by means of a system of division and resident engineers; and an operating department, organized later, in charge of completed portions of the road either constructed or purchased. Division and resident engineers were required to make detailed examination of the topographical and geological character of their assignments and a precise location of the route of the road. Profiles and detailed records of the necessary amounts of grading, clearing, embankment, bridging, and tunneling were sent to the Cincin-

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<sup>1</sup> *Report of Investigating Commission*, p. 219.

nati office, and used as data in the award of work. The method adopted in the award of contracts was that ordinarily employed in railroad construction. Each division was divided into forty sections, proposals for one or more of which were invited according to the nature of construction. Bidders were provided with the estimated quantities and classifications shown in the profile reports of the engineers, and bids were submitted for the performance of various classes of work at different rates. Awards were made by the Trustees upon the basis of the engineers' reports, ordinarily to the lowest aggregate bidder, but in cases where special reasons rendered this undesirable, according to the recommendation of the consulting engineer. Plans of great detail and minuteness were furnished contractors from the central office, in order to secure uniformity of design and construction in the entire Railway. Work was required to be done in strict conformity with these specifications, and was prosecuted under the immediate supervision of the resident and division engineers. The consulting engineer was the final inspector and umpire in regard to the character and value of all construction and of all disputed questions.

During February, March, and April, 1874, thirty contracts were awarded for the grading, tunneling and bridging of some one hundred and fifty sections. By the autumn of the same year, work on the preparation of the entire road-bed in the difficult region of southern Kentucky and northern Tennessee was well under way. In the early part of 1875, contracts were concluded for an iron truss bridge across the Ohio with an incline approach, for the remainder of the grading and masonry from Cincinnati to Lexington, and somewhat later for the structures of the bridges, viaducts, trestles, depots and freight stations, and for the supply of ties and steel rails in the same sections.

In the award of all contracts, the Trustees reserved the right, in the event of the financial embarrassment or unreasonable delay of contractors, to step in and carry on the work directly. Their ample resources and the industrial

depression of the period caused active competition for awards or re-awards, and ordinarily saved the Trustees from more than supervising and modifying the details of construction. Peculiar circumstances in one case, however, led them to engage for several months in direct construction. The first contract awarded was for one of the most difficult and important pieces of work on the road,—a tunnel, three-quarters of a mile in length, through King's Mountain. The first award of this was made on December 12, 1873. In November, 1874, the contractors became financially embarrassed and were forced to make an assignment, leaving the work in a highly critical state, with a crowd of creditors threatening to institute legal proceedings. Under these circumstances, any re-award of the work would have involved tedious and expensive litigation, delaying its prosecution for several months. To prevent this, as well as the dispersion of the large force of men at work on the tunnel, the Trustees proceeded to take direct charge of the excavation. Tools, machines, implements and live stock were rented from the assignees and the work actively continued. As in many other sections of the road, the unsettled character of the country had obliged the contractors to maintain a general supply store. The management of this was also assumed by the Trustees. Supplies were purchased by the president of the Board, through personal advantages, at actually less than the price paid by the contractors. After three months of successful operation, a settlement was effected with the creditors of the bankrupt contractor, the suits to which the Trustees were made parties were withdrawn, and the work promptly re-let. No period of the entire activity of the trust is more creditable than this brief season of direct construction.

By May, 1875, the amount actually expended in construction was \$3,539,782.10, which together with the outstanding liabilities, \$5,953,009.75, practically exhausted the ten million dollars loan. The legality of any further increase of liabilities on the part of the Trustees now came under consideration. A

majority of the Board decided that suspension of construction in the critical condition of the work would involve serious loss if not positive disaster, and that the statutory obligation to construct the Railway might justify a temporary excess of the amount of the original loan. Work was accordingly continued, steps being taken to secure an early supplementary loan.<sup>1</sup>

It will be remembered that the Trustees' original plan of detailed construction had been changed in the autumn of 1873, by a pressure of public sentiment, to that of constructing only a certain portion of the Railway, and then securing its completion and operation by a single contract to a private corporation; that this plan had been in turn prevented by the financial crash of 1873, which wiped out all confidence in railroad investment and obliged the Trustees to again revert to detailed construction. A "completing and leasing" contract had, however, remained the anticipated policy of the Board, and upon the exhaustion of funds in May, 1875, the steps taken to secure additional resources were with this in view. One hundred and fifty miles of the road-bed had been finally completed, and work on ninety-seven miles of the remainder was then in progress. The estimate of the consulting engineer represented \$6,000,000 additional as the sum necessary to complete the road-bed.<sup>2</sup> In conjunction with a contract of the kind proposed, this would insure the early operation of the road. In January, 1876, a bill supplementary to the Ferguson act was introduced into the Ohio legislature, authorizing the Board of Trustees to issue bonds for an additional sum not to exceed \$6,000,000, and to contract for the completion and lease of the road after its partial construction and before its final completion. At the same time, a bill in general terms was introduced, authorizing the incorporation of a common carrier company for this specific

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<sup>1</sup> *Report of Investigating Commission*, p. 95.

<sup>2</sup> Thomas D. Lovett, *Report on the Progress of Work*, November 1, 1875, p. 58.



purpose. The supplementary bill passed the Ohio legislature, but in so amended a form as to empower the Trustees to lease the road only six months *after* its entire completion, thus practically prohibiting the particular contract desired.<sup>1</sup> The insertion of this amendment was one of the most unfortunate episodes in the history of the Railway. It compelled a radical change in the policy of the Trustees, without providing the additional means for effecting it. The \$6,000,000 loan which the act authorized was sufficient to finish the road only in conjunction with a "completing and leasing" contract. The amendment obliged the Trustees to undertake the detailed construction of the permanent way of the road, superstructure and equipment, with funds merely sufficient, as careful estimates had shown, to complete the substructure. As a result, the Trustees were forced two years later to demand an additional loan of two million dollars, and while in 1876 eight millions would probably have been as freely given as six, the unfriendliness meanwhile developed against the undertaking by the slow progress of the work, together with doubt as to the sufficiency of the new loan, defeated the purpose of one enabling act, and by bitterly contested litigation retarded a second. It occasioned a critical delay in the completion of the Railway, and not only thus indirectly affected the financial interests of the city, but materially increased the ultimate cost of the work.

The \$6,000,000 loan received popular endorsement in March, 1876, and was negotiated with much less difficulty and upon more favorable terms than the first loan, the total amount realized being \$6,013,517.50. Efforts were now concentrated upon the early completion of the railway from Cincinnati to Somerset. Contracts were awarded in these divisions for unfinished grading and masonry, the superstructure of bridges and viaducts, track supplies, water and fuel stations, passenger and freight depots. Work proceeded with-

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<sup>1</sup> *Report of Investigating Commission*, p. 110. For text of the act, 73 Ohio Laws, p. 13.

out interruption, and in April, 1877, after unexpected delays due to river floods and the violence of the winter, the bridge across the Kentucky river, at that time the highest bridge in the world, and still remarkable for its great elevation and boldness of construction, was finished and successfully tested, thus completing the Railway for one hundred and fifty-eight miles. The desirability of a "completing and leasing" contract which would relieve the city from all further responsibility and at once open the road for local operation became now more than ever apparent. The common carrier act, authorizing the organization of private capital for this purpose, had already become a law, and on April 24, 1877, the Ohio legislature repealed the prohibitory clause of the "six million act," and by a fifth supplementary act authorized the Board of Trustees to contract for completing and leasing the whole line of railway, "after its partial construction, and before its final completion." No local corporation being prepared to enter into such an arrangement, a public meeting of citizens of Cincinnati was held on April 30, 1877, and an organization effected, under the provisions of the common carrier act, as the Cincinnati Southern Railway Company. Subscription books were opened a few weeks later and the greater part of the stock taken by local capitalists.

In the conferences and correspondence with the Board of Trustees which followed, in reference to the terms of the proposed contract, attention was called to the fact that the original ten million loan was secured by a mortgage lien upon the entire Railway. The announcement of this clause, which, strangely enough, had been overlooked by the incorporators, changed the entire situation. The objection was raised that the lien would either entirely prevent all further advance of capital for the completion of the Railway, or at least greatly embarrass the operations of the lessees.<sup>2</sup>

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<sup>1</sup> 74 Ohio Laws, p. 115.

<sup>2</sup> *First Annual Report of Cincinnati Southern Railway Company*, 1877-78, p. 9.

The dissatisfaction among stockholders became so marked that a general option of release from subscription was offered, with the result of a decided shrinkage in capital and a necessary modification of the contemplated "completing and leasing" contract to a mere operating license. On July 3, 1877, the Railway was leased on a determinable license to the Cincinnati Southern Railway Company for local operation between Cincinnati and Somerset. The licensees agreed to furnish sufficient equipment to operate the road and to accommodate all traffic, while the Trustees covenanted to maintain it in order and to allow the operating company out of its net earnings, ten per centum on the paid-up cash capital and ten per centum on the balance of the net earnings. Freight and passenger tariffs were to be fixed by joint agreement between the Trustees and the company, and the Trustees were protected against any damage arising from the operation of the road. The Railway was opened for traffic on July 23, 1877, and the first regular passenger train sent from each end three weeks later.

The operating license was granted as a merely temporary arrangement. It was believed that in a short time the company would be able to enlarge its capital and take a permanent contract to complete and lease. Under ordinary circumstances, this would probably have been the case. As it was, the great railway strike came in August, 1877, and public confidence in railroad investments, which for the first time since the crisis of 1873 had fairly re-established itself, was again shattered, and any extension of the lease, with the road in its present state, made impossible.<sup>1</sup> Ludlow continued as the northern terminus of the road until December, 1877, when as the result of eight different contracts, and at a total cost of of \$802,171.26, the bridge across the Ohio was so far completed as to allow the passage of trains. The license of the operating company was then extended so as to include the bridge and its approaches.

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<sup>1</sup> *Report of Investigating Commission*, p. 110.

On December 1, 1877, the total amount expended by the Trustees in construction and maintenance, together with outstanding liabilities, aggregated \$15,997,784.57, thus again exhausting the funds available. The Railway was at this time in actual operation between Cincinnati and Somerset. South of Somerset, all grading and masonry had been completed to within five miles of Chattanooga, where juncture was effected with the tracks of the Western and Atlantic Railroad. The superstructure of all bridges and viaducts had been built and supplies secured for the construction of the track. The work of completion embraced the complete repair of the road-bed and masonry, the construction of the superstructure of viaducts and bridges, the laying and ballasting of the main track, sidings, and the erection of all buildings necessary for the opening of through traffic between Cincinnati and Chattanooga. Careful estimates gave three and a quarter millions as the amount necessary for the independent completion of the work, considerably less in conjunction with a completing and operating lease.<sup>1</sup> The latter estimate was adopted by the Trustees, and in April, 1878, the Ohio legislature passed the sixth supplementary or "first two million" act, authorizing the issue of bonds to this amount, subject to the usual ratification of qualified electors. No part of the proceeds should be applied to the portion of the road already in operation prior to the completion of the whole, and no sum exceeding \$50,000 should be expended for the purchase, or more than \$6000 per annum for the rental of terminal facilities. The aggregate compensation of the Trustees was limited to \$5000 per annum, and the approval of the Trustees of the Sinking Fund was required for the temporary lease of completed portions of the road and for the ultimate disposition of the whole. The discretion of the Trustees was further restricted by conditioning the use of public streets and grounds upon the consent of the Board of Public Works.<sup>2</sup>

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<sup>1</sup> G. Bouscaren. *Report on the Progress of Work*. December 1, 1877, p. 20.

<sup>2</sup> 75 Ohio Laws, p. 115.

The difficulties encountered in the passage of the act, the restrictions imposed upon the hitherto absolute discretion of the Trustees, and the niggardly compensation allowed them, gave evidence of the disfavor with which any further loan in aid of the Railway was regarded. Commercial interests were depressed, and the interest charge upon the already immense bonded indebtedness had become very burdensome. Doubt was openly expressed as to whether the two millions would complete the road-bed, while a contract to complete and lease, in the present dependent position of the city, could only be made, it was thought, upon unfavorable terms. These facts, together with the inactivity of friends of the measure, led to the bare defeat of the loan on May 3, 1878,—11,237 votes being cast "for" and 11,456 "against" the issue of bonds.

The defeat of the loan and the conservative state of popular sentiment necessitated a decided limitation in the policy of the Trustees. On May 15, a second \$2,000,000 loan was authorized by the General Assembly, differing from the first to the general effect of transferring the completion of the road from the discretion of the Trustees to the determination of popular vote. The Trustees were directed, upon the passage of the measure, to invite proposals for the completion of the Railway and to conditionally accept the lowest and best bid, provided that it did not in the aggregate exceed the amount of bonds authorized by the act. After the bid so accepted had been duly announced, the issue of the bonds should be submitted to the vote of qualified electors of Cincinnati. In the event of popular ratification, the fund realized should be devoted solely to the completion of the Railway, with the exception of the sum of \$50,000, to be expended in terminal facilities and in the purchase of right of way.<sup>1</sup> Proposals were at once invited in accordance with the terms of the act, and the lowest of the four bids submitted, that of R. G. Huston & Co., estimated as aggregating

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<sup>1</sup> 75 Ohio Laws, p. 559.

\$1,671,998.11, conditionally accepted. After a vigorous canvass by both friends and opponents of the measure, a special election was held on August 14, and the loan decisively ratified,—16,224 votes being cast "for" and 10,425 "against" the issue. On August 27, the Huston bid was formally accepted and the contract signed. The opponents of the Railway had, however, not yet exhausted their resources, and continued the attack in persistent litigation, questioning the legality of the later bond issues. No more disastrous condition for all interests could be well conceived than had the plea been upheld and the city left in possession of the uncompleted road. The constitutionality of both loans was, however, sustained by the Superior Court of Cincinnati, and this opinion affirmed by the Supreme Court of Ohio in December, 1878.<sup>1</sup>

This litigation wasted six precious months and effected corresponding injury to all interests. By putting in doubt the validity of the bonds to be issued for the completion of the Railway, it prevented the contractors from promptly commencing or actively prosecuting the work. The city suffered from the loss of the unusually heavy autumn traffic which set in with the general revival of all trades and manufactures. The delay was even more disastrous to the contractors, who were obliged to bear the great rise in the prices of labor and material that took place in the interval.<sup>2</sup> Not until the decision of the Supreme Court had definitely established the validity of the loan was any work done on the contract. In September, 1878, an extension of time was granted the contractors in consideration of the pending suit, and after January, 1879, the work of completion proceeded with great rapidity.

The operation of the completed portion of the road, from Cincinnati to Somerset, by the Cincinnati Southern Railroad

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<sup>1</sup> For the first case *v. Thomas vs. Greenwood*, 7 American Law Record, 230. The case in the Supreme Court was never reported.

<sup>2</sup> G. Bouscaren, *Report on Progress of Work*, January 1, 1880, p. 54.

Company had meanwhile been attended with increasing success. The gross earnings of the road for the eleven months ending June 30, 1878, were \$366,577.30, or \$2320.10 per mile. It was now felt that the terms of the existing lease, which guaranteed a ten per cent. dividend to the stockholders of the company and large salaries to its officers, were by no means as favorable to the city as was proper. Negotiations failing to secure more equitable terms, a formal termination notice was served, and in April, 1878, the Railway was re-leased on a determinable license to a syndicate of local capitalists operating under the charter of the Cincinnati Railroad Company. The new lease guaranteed the licensees an annual dividend of seven per cent. on capital invested, but in other respects differed little from the preceding covenant. In June, 1879, the last link was added to the Railway by the location of an independent bed from Boyce's Station to Chattanooga, parallel with the Western and Atlantic Railroad.

In the early part of February, 1880, the entire Railway had been so far completed as to allow the slow passage of through trains. On the evening of February 21, 1880, the first two south-bound freight trains left Cincinnati, laden with meats, whiskey, clothing, drugs, starch, furniture and hats, for Chattanooga, Knoxville, Atlanta, Jacksonville, Charleston, Birmingham, Macon and Meridian. Five days later brought the first return shipment of cotton from Birmingham to Cincinnati. After several weeks of freight traffic to accustom the engineers to the grades and stations of the Railway, the first passenger train was sent on a trial trip from Cincinnati to Chattanooga on March 8. The Railway was formally inaugurated a few weeks later by a monster reception to Southern tradesmen by citizens of Cincinnati. Eleven hundred representative merchants,—many of whom had last visited the neighborhood in the ranks of Morgan or Kirby Smith,—were centered in Chattanooga, brought to the Queen City in special trains and royally entertained for four days. Not the least influence of the Railway, then as now, has been to soften social prejudices and erase sectional lines.

## V.

## LEASE AND OPERATION.

The business of the Railway in both freight and passenger traffic increased steadily during the first year of its operation. The total earnings for the twelve months ending December 31, 1880,—during only ten of which the Railway was open for through traffic,—were \$1,487,060.18, of which \$345,917.80 was received from passenger and \$1,062,410.61 from freight business. The guaranteed dividend of seven per cent. on all invested capital to the operating company became now as unfavorable to the city as the terms of the earlier lease had been. Other considerations too directed public attention towards the final disposition of the road. The burden of municipal taxation imposed to meet the annual interest charge upon the immense bonded indebtedness rendered the receipt of large and regular returns desirable.<sup>1</sup> Commercial interests also urged closer affiliation and more direct connection with southern railroad systems. This was represented as possible only upon a longer lease to a more heavily capitalized corporation.

A section of the original Ferguson act provided for the lease of the Railway, upon its final completion, “to such person or company as will conform to the terms and conditions which shall be fixed and provided by the council of the city by which the line of railroad is owned.” This provision had been repealed by a specific clause of the “first two million” act, so as to leave the Trustees only the more limited authority of leasing the road in accordance with the “completing and leasing” theory, after its partial construction and before its final completion. To secure more definite legislation, a conference of the Trustees of the Railway and of the

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<sup>1</sup> In 1880 the interest charge was \$1,254,300, requiring an item of 7.60 mills in the municipal levy of 25.20 mills. Cf. *infra*, p. 75.



Sinking Fund, with committees of the Chamber of Commerce, the Board of Trade, and the Taxpayers' League, was held in January, 1881, and a bill recommended to the Ohio legislature, authorizing the sale or lease of the Railway, at the discretion of the Trustees,—the sale to be for not less than the aggregate par value of the bonds issued for construction purposes, the lease for a period of not less than twenty-five years, upon terms to be arranged by the Trustees of the Railway and ratified by the Trustees of the Sinking Fund. In passage through the legislature, this act was changed in form from a discretionary to a mandatory measure, the Trustees being now required, instead of authorized, to sell or lease the Railway.

Three general plans naturally suggested themselves,—outright sale, lease at a definite rental, and lease at a fixed percentage of earnings. The Trustees of the Sinking Fund supported the idea of a fixed rental, while a majority of the Trustees of the Railway urged the per centum plan. The joint action of the two bodies was necessary for any final arrangement, and the Railway Trustees yielded eventually in favor of the definite rental scheme. Proposals were accordingly invited for the lease of the road for a term of twenty-five years, with progressive rentals for each period of five years. Ten proposals in all were received, the more important representing the present lessees, several bodies of Cincinnati capitalists, the Louisville and Nashville Railroad, and the Erlanger syndicate, controlling the Alabama Great Southern and the East Tennessee, Virginia and Georgia Railroads. The bids varied in amount from \$500,000 to \$800,000 per annum for the first term of five years, and from \$980,000 to \$1,042,000 as the average annual rental. The terms offered were far more favorable than had been anticipated, and excited general elation.<sup>1</sup> On September 3, 1881, the bid of the Erlanger syn-

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<sup>1</sup> "If any of the bids equal what the city will this year realize from the Southern, they will be much larger than is anticipated."—*Cincinnati Enquirer*, August 25, 1881, the morning of the day on which the bids were opened. The net sum received by the city in 1880 and 1881 was \$420,379.59.—*v. Report of Sinking Fund, 1885*, p. 28.

dicate was accepted, as providing the largest immediate return. It specified a progressive rental of \$800,000 per annum for the first five years, \$900,000 for the second, \$1,000,000 for the third, \$1,090,000 for the fourth, \$1,250,000 for the fifth. In addition, the lessees covenanted to return the Railway at the expiration of the lease as a completed "first-class single track road." This involved the replacement of much temporary with permanent equipment and the provision of additional facilities, estimated as costing \$2,786,462.25,—eighty per cent. of which would probably have to be expended within the first five years. The lessees moreover agreed to purchase all unused material still in the hands of the Trustees and to provide \$12,000 annually to cover the necessary expenses devolving on the Board in conducting their trust. The Trustees, on the other hand, agreed to provide terminal facilities in Cincinnati "to the extent of their trust funds provided by law for that purpose," also to secure additional land necessary for the operation of the Railway, upon the request and at the expense of the lessees. A mortgage on the rolling stock and other property of the company was taken as security for the faithful performance of obligations. Non-payment of rental or breach of covenants involved the forfeiture of the lease, and all questions of difference arising between the parties in reference to the terms of the lease were to be settled by arbitration.

An organization was promptly effected by the lessees under the franchise of the Cincinnati, New Orleans and Texas Pacific Railway Company, with a capitalization of \$3,000,000. Fifty-one per cent. of this was reserved by the syndicate, the remainder taken at par with unsatisfied demand by local capitalists. A termination notice had some months before been served upon the operating company, and the road was promptly transferred to the new lessees.

The Railway became thus incorporated with an important trunk line, the Alabama Great Southern, or Erlanger system, then operating the Alabama Great Southern Railroad from Chattanooga to Meridian (295 miles), and the Alabama

and Vicksburg Railroad from Meridian to Vicksburg (145 miles). The system has since been extended by the construction of the New Orleans and Northeastern Railroad from Meridian to New Orleans (196 miles),—establishing an unbroken line of railway between Cincinnati and New Orleans; also by the construction of the Vicksburg, Shreveport and Pacific Railroad from Vicksburg to the Texas-Louisiana State line (189 miles), where connection is made with the Texas Pacific Railroad. The total mileage of the system is thus 1159 miles.

In April, 1890, the East Tennessee, Virginia and Georgia Railroad purchased from the Erlanger syndicate a controlling share of the stock of the Alabama Great Southern Railroad, and thus secured a voting power over a majority of the capital stock of the Cincinnati, New Orleans and Texas Pacific Railway Company. The two systems have since been associated in operation as the "Queen and Crescent Route," with Cincinnati as the northern terminus.

In March, 1893, by amicable suit instituted by the chairman of the board of directors as stockholder and creditor, the C. N. O. & T. P. Railway Co. was adjudged insolvent by the United States Circuit Court of Ohio, and Samuel M. Felton, president of the company, appointed receiver. The depressed condition of the South, the increasing rental and the shortening term of lease had for some time arrested the earnings of the lessees. The immediate cause of the receivership was the decision of the Superior Court of Cincinnati in the so-called "Doughty over-issue cases," whereby the company was held liable for the issue by a former secretary of a large amount of fraudulent stock. An attempt to secure from the stockholders the bond necessary to carry the cases to the Supreme Court of Ohio having proven unsuccessful, and the holders of the judgments being unwilling to accept a second mortgage on the acquired property, resort was had to the receivership in order to protect all interests by preserving the property intact and to enable the cases to go in appeal to the Supreme Court.

The appointment of a receiver for the operating company does not, it is believed, affect the city's interest in the Railway. A leasehold, and not the Railroad itself, is involved. A default in rental would lead to a sale of the lessee's interest, and the purchaser would be subject to the terms and covenants of the lease, precisely as the present company. Any deficiency in rental would be secured by the prior lien held by the Trustees. At the present time the prompt payment of rental and the unimpaired operation of the road under the receivership render the above consequences interesting mainly in point of theory.

Since 1880 the relation of city and Railway has consisted largely in the formal payment and receipt of rental. Further contact has centered about two points,—the provision of adequate terminal facilities, and the extension of the present lease. So much light is thrown in this connection upon the attitude of the several interests concerned, as to make it worth while to trace in some detail the development of the present situation.

While the Railway was still operated upon a determinable license, the pressing need for terminal facilities in Cincinnati led to the passage by the Ohio legislature of a bill authorizing a special loan of \$300,000.<sup>1</sup> By the terms of the 1881 lease, the Trustees agreed to expend the entire fund for this purpose. Up to 1885 about one-half of it had been used in the purchase of depot and yard sites, while negotiations were pending for devoting the remainder to their conversion and improvement. In January of that year, an opinion was submitted by the attorney of the Trustees denying the legality of this practice, and holding that no portion of the loan could be properly expended for any purpose other than the literal purchase of property or right of way. Specific authority was accordingly secured from the Ohio legislature in April, 1885, for the expenditure of any portion of the fund for "the improvement of grounds already acquired." After some

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<sup>1</sup> 77 Ohio Laws, p. 153.

delay, contracts were awarded, and in the following year, the work prosecuted almost to the full limit of the fund. The operation of the road was meanwhile proving more onerous to the lessees than had been anticipated. This arose less from the amount of the rental charge than from the fact that the expenditures for completion and betterment, instead of being spread equally over the entire term of the lease, thus needing an additional annual outlay of about \$100,000, had largely to be made within the first few years. This requirement had been specifically stated in an unofficial exhibit, supplementary to the published call for bids,<sup>1</sup> but seems to have been overlooked or underestimated by the leasing company. As it was, the amount so expended up to January 1, 1887, was \$1,266,017.26, making the gross average annual rental for the first quinquennial term \$1,065,203.43, or 32 per cent. more than the \$812,000 directly provided by the lease. In view of the increase of fixed rental which the second term of the contract would bring with it, and the probable continuance of large expenditures for permanent improvements, an attempt was now made to modify the terms of the lease by deferring the payment of \$200,000 of the annual rental for a term of seven years, to be then repaid with interest in annual installments of \$100,000. A bill embodying this modification was presented to the Ohio legislature in 1886, but failed of passage. The delay in providing adequate terminal facilities, the uncertainty of remedial action, and more directly the failure of this attempt to modify the terms of the lease, led the lessees in December, 1886, to file a claim with the Trustees aggregating some \$500,000 for expenses incurred up to that date from the want of adequate terminals. Without admitting the validity of the claim, the Trustees proceeded to

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<sup>1</sup> "I estimate that 80 per cent. of the entire amount estimated must be expended in the first five years of the lease, in equal yearly installments of say \$445,000 each."—Letter of G. Bouscaren, Consulting and Principal Engineer, to W. H. Clement, General Manager of the Cincinnati Railroad Company. Published by the Board of Trustees, November 19, 1880.

take the matter under careful advisement. A conference of lessees and Trustees was held in April, 1887, and an agreement effected, that in consideration of the company not pressing its claim until the close of the session of the General Assembly of 1888, the Trustees would endeavor to secure legislation permitting an extension of the time of the lease, and an exchange of the outstanding bonds for longer time, lower rate securities,—necessary for any rearrangement of the rental charge. An enabling act of this character passed the Ohio Senate during the legislative session of 1888, but remained pending in the House. By mutual agreement the matter continued *in statu quo* until the passage in March, 1889, of the supplementary act known as the "Mack Bill," providing for the conversion of the outstanding bonds into lower rate, longer time securities, and authorizing an extension of the time of the lease, upon the condition that the rental during the extension should not be less than \$1,250,000 per annum.<sup>1</sup> It permitted no modification of the lease, as desired by the lessees.

The leasing company declined to take any action under the provisions of this measure, and at once served notice terminating the agreement of April, 1887. A new claim, aggregating \$824,406.35, was presented as the expenses incurred from the beginning of the lease up to that time; first, by the absence of adequate depot and yard accommodations; second, by the misrepresentations of the Trustees as to the condition of the Railway at the time of its lease. Some weeks later, a formal demand for arbitration, as specifically provided in the lease, was transmitted, and Mr. Grover Cleveland and Mr. Clarence G. Seward named as arbitrators for the company. Further imminent complications were checked at this point, and the matter properly brought up for judicial determination by the petition of the City Solicitor of Cincinnati for an injunction restraining the Trustees from proceeding to arbitrate the claim of the company. A tem-

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<sup>1</sup> 86 Ohio Laws, p. 67.

porary injunction was allowed in the Court of Common Pleas, but afterwards dissolved. A second restraining order was granted on appeal to the Circuit Court, and the case adjudicated. The important allegation of the petition was that the power and duties of the Trustees had ceased with the lease of the Railway, and that the demand made upon them for arbitration was for this reason entirely nugatory. It virtually became a plea for the ouster of the Board. A majority of the court decided, (1) that the office of Trustee was still in existence and held by the present incumbents; (2) that the arbitration clause of the lease was valid and binding for losses incurred from the want of adequate terminal facilities; (3) but not for damages arising from misrepresentation in the original lease. The presiding judge agreed on the first and third propositions, but dissented on the second, holding that the Trustees were required by the lease to provide terminal facilities only to the extent of their trust fund; that of this sum, two hundred and ninety thousand dollars had already been spent and that practically nothing therefore remained to arbitrate. The case has been taken in appeal to the Supreme Court of Ohio and is now pending. In the interim, an attempt has been made to arrive at a partial settlement of the whole vexed question of terminal facilities by the vacation of certain streets in Cincinnati through municipal ordinance.

The Railway, upon its completion, took rank as an important north and south trunk line. Its strategic position gave special advantages over established roads and secured a large amount of competitive trade. Experience soon however made it clear that the usefulness of the Railway could be more fully realized by large outlays made by the leasing company for improvement and extension purposes and by permanent agreements with connecting roads. This, it was represented, demanded an enlargement of capital, possible in turn, only upon the basis of an extension of lease. The desirability of some such action was early presented by the leasing company, gradually recognized by public sentiment, and later urged by the commercial interests of the city. In March, 1889, the

"Mack Bill," already referred to, was passed, authorizing the Trustees, with the approval of the Trustees of the Sinking Fund, to extend the time of the lease for a term not exceeding forty years, provided that the rental after the expiration of the present lease should not be less than \$1,250,000 per annum, and that the extension should be made within three years after the passage of the act. The operating company declined to entertain any modification of the lease as therein authorized, and for two years the act remained practically inoperative. In the spring of 1891, attention was called anew to the desirability of some permanent agreement and the necessity of immediate action if the change was to be effected under the provisions of this measure. The matter was promptly taken up by the commercial bodies of Cincinnati and referred to a joint committee for consideration. A comprehensive report was submitted and adopted by the several bodies. It declared that with the present lease in effect, the sale of the Railway could only be made to the lessees, and consequently with the city placed at a serious disadvantage. Even were it possible for the lessees to secure a modification of their charter so as to authorize an outright purchase, and to pay to the city the full value of the Railway, practically insurmountable difficulties yet remained. Thus, enabling legislation would have to be secured not only in Ohio, but in Kentucky and Tennessee as well; the question of sale would have to be submitted to the electors of Cincinnati, and the unanimous consent of the bondholders holding a first lien upon the railway would have to be secured. It was the opinion of the committee that the best interests of the city would be subserved by an extension of the present lease in perpetuity, under the essential conditions of the "Mack Bill." In addition, it was recommended that a provision be inserted in the lease that when the gross earnings of the road exceed a certain amount per mile, a fixed percentage of the surplus should revert to the city as increased rental; also, that in view of the valuable concessions proposed in a perpetual lease, a specific covenant be added that the



rates from Cincinnati to certain southern points should not exceed specific percentages of the rates from New York to such points. Upon the announcement of the report, and prior even to its adoption, the president of the leasing company publicly declared that an extension of the lease upon the conditions named would not be accepted. No formal proposition was either made or received by the Trustees, and on March 6, 1892, the authority conferred by the "Mack Bill" expired by limitation.

An enabling act passed March 12, 1887, and apparently still in force,<sup>1</sup> authorizes the Trustees of the Sinking Fund to negotiate for the sale of the Railway whenever a resolution declaring this advisable shall have been passed by the city council. The terms of the sale must be submitted to and endorsed by a majority of the qualified electors of Cincinnati. No action has been taken under this act. A measure compassing the same end, but in less satisfactory form, was introduced in the Ohio legislature in March, 1893. Instead of the Trustees of the Sinking Fund, the mayor and corporation council were empowered to sell the Railway, at not less than the aggregate par value of construction and terminal bonds. The expediency of sale, and not the terms provisionally accepted, were to be submitted to popular vote. The inspiration of the measure was in some doubt, and through the active efforts of the commercial and other interests of Cincinnati, it failed of passage. It is probable that any change in the present status of the Railway will be preceded by new and specific legislation.

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<sup>1</sup> 84 Ohio Laws, p. 82.

## VI.

## A REVIEW OF THE TRUST.

Before proceeding to describe the influence of the Railway upon Cincinnati and its various interests, it seems desirable to add something of criticism to the preceding facts.

Little need be said in this connection regarding the general theory upon which the Railway was built. The necessity of a direct line of communication with the South had long been admitted; in default of individual or State initiative, municipal construction remained the only alternative. It may perhaps be doubted whether, with a full knowledge of the time, cost and embarrassment involved, the construction of the Railway would have been undertaken at the precise time it was. Yet it is difficult to see what other could have been the outcome of the situation. Conservative sentiment declared that if the road were demanded, it would ultimately be built by private capital. But the commercial existence rather than the development of Cincinnati was threatened, and while the building of the road may have been attended with hazard, it would have been much more hazardous not to build it. It was a realization of this fact that led to the support of the plan of municipal construction, not only by the commercial bodies of the city, but by the entire local press and by intelligent sentiment at large.

The Feiguson act is among the most original and ingenious pieces of American legislation. The constitutionality of both the enabling measure and of the mass of supplementary enactments has been established in repeated litigation and seems finally clear of doubt.<sup>1</sup> Opinion differs as to the

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<sup>1</sup>The validity of the enabling acts was directly sustained by the Superior Court of Cincinnati in *Walker vs. Cincinnati* (1 Cin. Sup. Rep., 121) and in *Thomas vs. Greenwood* (7 Am. Law Rec., 320). These cases were affirmed in the Supreme Court of Ohio, only the first being reported (21 Ohio St., 14).

theoretical correctness of the judicial construction. The letter of Judge Cooley already cited is largely in the line of the final interpretation of the Ohio courts. On the other hand, Judge Dillon says of the leading case in the Supreme Court of Ohio, *Walker vs. Cincinnati* (21 Ohio St., 14), "It seems difficult to avoid the conclusion that this construction thwarts the intention and purpose for which the provision was designed and adopted," and again, "Particularly does it subvert all previous notions of appropriate powers, functions and duties of municipalities."<sup>1</sup> Similarly Judge Redfield criticizes the same decision for its failure to declare the law void, as being "in violation of the true spirit and intent of the constitution," and lays down as a fundamental objection to the interpretation, that "one State can neither by itself nor its municipalities construct and maintain public works of internal improvement in other States."<sup>2</sup> In *Pleasant Township vs. Aetna Life Insurance Company*,<sup>3</sup> Justice Brewer, of the U. S. Supreme Court, while distinctly refraining from criticizing the decision in *Walker vs. Cincinnati* as erroneous, noted the fact that "the statute therein construed was a skillful avoidance of its generally understood scope."

Although consistently maintaining the constitutionality of the Railway legislation, and the correctness of the original judicial decision, the Ohio courts have zealously guarded the interpretation so made. In April, 1872, a measure known as the "Boesal Law," purporting to be similar to the Ferguson act, was passed by the legislature, authorizing counties, townships and municipalities to build railroads. It provided for the appointment of boards of commissioners, who should in each case issue bonds to a specified amount, and contract for the construction of an entire railroad or for the greatest number of miles that a responsible bidder would agree to build for the sum appropriated. The road so con-

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<sup>1</sup> *Municipal Corporations*, 4th ed., i., p. 229.

<sup>2</sup> 11 Am. Law Reg. (n. s.). 346.

<sup>3</sup> 138 U. S. Rep., 71.

<sup>4</sup> 69 Ohio Laws, p. 84.

structed was to be sold or leased either before or after completion. Under the actual operation of the law, the local authorities never seriously undertook the work of public construction, but at once contracted with an existing or projected railway. To all purposes it was as though a local subscription to the amount of the bonds authorized had been made to a specific corporation. The local courts sustained the constitutionality of the measure under the decision of *Walker vs. Cincinnati*. The Supreme Court of Ohio, however, pronounced it a palpable evasion of the constitutional restriction, and granted a perpetual injunction against the issue of bonds.<sup>1</sup> In 1880 several acts of the same character, general in form but special in fact, were passed by the legislature, authorizing certain townships to build railroads. They were promptly declared unconstitutional by the Supreme Court of the State and perpetual injunctions granted.<sup>2</sup>

The Ferguson act conferred "the greatest trust ever before committed to any board in the State of Ohio" upon a body of five trustees, appointed by a local court and holding office during good behavior. Something has been already said of the policy which determined the composition of this board. The duties devolving upon it were recognized as various and important. It was believed that where delicate legal, financial and technical matters were in turn involved, the appointment of a commission composed exclusively of railroad experts was undesirable. The influence of a single person of this kind would, on the other hand, prevent anything like collective activity. Representative citizens of unquestioned integrity and large public spirit were accordingly selected for the execution of the trust, rather than persons technically skilled in railroad construction. The unfitness of a board of railroad experts may well be conceded. The Railway is primarily a legal triumph, and it is highly question-

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<sup>1</sup> 23 Ohio St., p. 76.

<sup>2</sup> *v. Wycaver vs. Atkinson*, 37 Ohio St., p. 80, and *Counterman vs. Dublin Township*, 38 Ohio St., p. 515.

<sup>3</sup> *Report of Investigating Commission*, p. 49.

able whether a technical body could alone have piloted the project through the legal reefs that threatened its entire course. The prospective need of legal assistance, if nothing else, would have urged the appointment of Mr. E. A. Ferguson as a trustee. In the long fight for enabling legislation in Kentucky, in the bitterly contested litigation questioning the validity of the construction loans, and in the preparation of repeated supplementary measures, the direction of affairs was always left to him. The negotiation of the several loans called for general business experience and sagacity rather than for any high degree of special skill. Yet whenever occasion arose for *finesse*, the practice of the Trustees was to entrust it to those members of their body most experienced in financial operations.<sup>1</sup> The remaining members of the Board in every case exercised active advisory functions, and the responsibility assumed was at all times collective.

The technical skill required in the projection and construction of the Railway presents an exact parallel. It seems surprising that the *personnel* of the Board should not have included one or more persons of the same high character and integrity, but as skilled in railroad construction, as were certain other members, respectively, in legal and financial matters. The "one-man" power discredited in construction was resorted to in litigation and, in a less degree, in bond negotiation, and proved eminently successful. Even with the adopted policy, individual predominance could not be avoided. It was simply shifted from a technically skilled Trustee, aware of his own responsibility and the magnitude of the issues involved, to an employee whose interests must at best have been professional. The Trustees exercised great care and sagacity in the selection of their chief subordinates, and were seldom disappointed. Yet there were occasions when the absence of technical oversight was keenly felt, and it can hardly be doubted that the checking, testing influence of a skilled Trustee would at all times have been advantageous.

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<sup>1</sup> *Report of Investigating Commission*, p. 76.

Time and experience have fully vindicated the judgment of the Trustees in the direction of preliminary surveys, the selection of a main route, and the final location of the Railway. The work of the surveying department consumed more than two years of time and cost \$183,969; but it placed the Trustees in full intelligent command of the situation and made possible the selection of absolutely the best line. The cheaper grades of the "Eastern" route would have probably meant several millions less total cost, but in selecting an air line, the Trustees chose even wiser than they knew. The failure of negotiations with the Kentucky Central Railroad and the Newport Bridge Company led to the construction of an independent line from Lexington to Cincinnati. It developed a certain amount of local hostility and retarded the progress of the work somewhat. On the other hand it materially shortened the route, and secured actual ownership of a terminal approach instead of a mere easement over one already existing.

The issue and sale of bonds was one of the most important duties committed to the Board of Trustees. Three construction loans, aggregating eighteen million dollars, were authorized between 1869 and 1878. These were negotiated barely at par in the form of thirty-year bonds, bearing interest variously at six, seven and seven and three-tenths per cent., without option of earlier redemptions. In the light of positive results, this seems the least satisfactory part of the activity of the Trustees. Some care is, however, necessary in determining in how far it has resulted from their choice, in how far from conditions beyond their control. The gravest obstacle to the successful negotiation of the loans was the statutory restriction to sale of bonds at par. It necessitated the use of a high interest security, which, as has been seen, operated as *prima facie* evidence against the credit of the city. A lower rate bond, offered at a discount, could have been negotiated much more readily, and, all things considered, upon as favorable terms.<sup>1</sup> The Trustees were, however, as powerless in

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<sup>1</sup>*Report of Investigating Commission*, p. 76.

making this substitution as in effecting any change in the absolute amount of the loan. The enabling acts provided for the issue of bonds to a certain amount, to be negotiated under certain conditions, of which sale at not less than par was one. The Trustees were left with no discretion whatever in the matter. After the failure of negotiations with English capitalists, they were urged to seek authority for the issue of bonds having lower interest and negotiable below par. It was, however, clear that no supplementary legislation of any kind could be secured at a time when the expediency of the entire project was in doubt, and no steps were taken in this direction. Even under ordinary circumstances, it is improbable that a modification of the kind could have been effected. The clause restricting to sale at par was added to the Ferguson act in passage through the Ohio legislature, as it was to every act authorizing a municipal loan in Ohio. During the same session of the legislature, this practice crystallized into a general statute, that "in no case shall the bonds of a corporation be sold for less than their par value."<sup>1</sup> How strong was the hold of this limitation upon the legislative mind is seen in the fact, that despite the unsatisfactory results of the first loan and the passage of a general enactment, precisely the same restriction was inserted in the subsequent six and two million acts.

Whether the Trustees were justified in the use of a long term irredeemable bond will probably always remain a debated question. Taught by actual results, it is easy to characterize as a financial blunder the policy whereby the city, although now borrowing money at four per cent., is still made to pay seven and three-tenths per cent. upon bonds secured both by the municipal faith and by a statutory mortgage lien upon an unquestionable asset. Such sweeping criticism has little regard for the conditions under which the loans were placed. In the financial depression of the period, the negotiation of a redeemable loan would have been practically

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<sup>1</sup> 66 Ohio Laws, p. 263.

impossible and was so recognized. The need for funds had grown imperative in each case, and with the abandonment of the entire project as the only alternative, the Trustees undoubtedly acted as wisely as they knew. The general nature of the final negotiations was endorsed by able financiers and seems to have been the most favorable that the peculiar circumstances involved would permit.

The plan adopted by the Trustees in the negotiation of the loans was to address circulars to large financial interests, followed by specific negotiations for blocks of bonds. The question has been raised whether a proper system of general advertisement for the sale of bonds in limited amounts would not have resulted in more favorable terms, or at least have preserved the Trustees from the temptation to lavish expenditures involved in the possession of large quantities of ready money. Here as elsewhere, a categorical answer is impossible. It seems, however, clear that the operations of the Trustees throughout the early period of construction required the easy control of large sums of ready money. During 1887 their expenditures were from two hundred thousand to four hundred thousand dollars per month. It would have been hazardous to rely on periodic bond sales to meet these liabilities. On the other hand, any exercise of the reserved right of paying contractors with bonds would have enhanced the cost of construction and probably have affected the credit of the city. There is no evidence that the large sums of money on hand tended to extravagance. Surplus moneys were promptly converted into government securities and utilized only as needed.

The absence of a practical engineer in the Board of Trustees proved to be a serious weakness in the award of contracts relating to the construction of the road-bed. Technical skill and not ordinary business experience could determine what bids were exorbitant, in what cases contracts should be awarded to other than the lowest bidder, when plans should be modified, and when classifications raised in order to prevent suspension of work. The Trustees were



dependent in these and in similar matters upon the fidelity and capacity of the consulting and principal engineer, an expert of high reputed ability and integrity. Searching investigation failed to disclose any trace of fraud or collusion, yet the presence of an experienced, responsible trustee must have proven clearly advantageous. Bidders for grading and masonry were provided with copies of the classifications and quantities to be excavated, as reported by the division engineer, but were, however, cautioned not to rely upon these data, but to make personal examination of the locality. As results showed, this latter injunction was generally disregarded, and the engineers' profiles and classifications came to be regularly employed as the basis of bids as well as awards. A wide discrepancy consequently resulted between the original estimates of the cost of the work and the amount actually expended. The original estimates for the grading and masonry of 321 sections of the Railway aggregated \$6,367,759.87; the actual cost was \$9,688,885.39, or 52 per cent. more than the amount estimated.<sup>1</sup> The uncertain character and great irregularity of the region penetrated must in any event have caused some inexactness. Thus in 33 sections, the final cost of construction proved less than the original estimates. In other cases, the engineer's estimates, although less than the final cost, were still in excess of the contractor's estimates. A large part of the discrepancy also arose from a subsequent change in the policy of the Trustees, from the construction of an average road as provided in the original estimates of one engineer, to that of a much superior and altogether different road as built by his successor.<sup>2</sup> Yet it seems clear that the profiles and classifications of the engineering department should have been originally prepared with more exactness or afterwards carefully revised. The wide divergence between estimated and final cost not only fostered unfriendliness towards the project by creating a false impression of the total cost of the Railway, but actually

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<sup>1</sup> *Report of Investigating Commission*, p. 238.

<sup>2</sup> *Ibid.*, pp. 204, 216.

increased the aggregate expenditure in cases where final quantities of different classes of material were not proportional to the approximate classifications upon which the awards were made. Finally, in cases where bidders followed the injunction of the Trustees and visited the locality, the more accurate knowledge thus obtained, as against the approximate classifications used by the Trustees in the award of bids, gave opportunity for legitimate but exceedingly disastrous shrewdness in the preparation of bids. One notorious instance of this was contract No. 34, for sections 50 and 51, Division B. The classifications represented 157,900 cubic yards of "earth excavation," 147,900 cubic yards of "embankment" and no "loose rock." A contractor who had been in the topographical corps during the war and active in that region of Kentucky, at once saw the improbability of the classification. He visited the section, and after careful examination, aided by accidentally exposed strata, submitted a bid with low figures on "earth excavation," and very high rates on "embankment" and "loose rock." The issue of the work justified his most sanguine expectation. The work aggregated only 41,132 cubic yards of "earth excavation," but 107,012 cubic yards of "loose rock," and 204,396 cubic yards of "embankment." The total cost of the two sections was \$140,307.17, as against the original estimate of \$48,346.00. Of the 54 other bidders on these sections, all but one would have done the work for less, by amounts ranging from \$8,723.86 to \$67,496.50, and averaging \$38,382.32.

The plan of securing the completion and lease of the railway by a single contract, or the "completing and leasing" theory, has been criticized as the *ignis fatuus* of the trust. As has been pointed out, it was less the original choice of the Trustees than the plan forced upon them by the popular discontent of 1873; thenceforth it, however, remained their anticipated policy. Its advantages were obvious. The funds of the trust would be supplemented by private capital and further municipal loans obviated. The Railway would be opened

for through traffic at an earlier date than otherwise; inasmuch as the lessees could distribute the work of detailed construction over a number of years, whereas the Trustees would be obliged to finish it at once. Finally, the lessees could afford to take reasonable risks in construction, which, in view of the liability of the city as a common carrier, the Trustees could not. These considerations more than counterbalanced the obvious disadvantage that the plan involved the organization of private capital on a large scale and under unusual conditions, and in any but a period of railroad activity placed the city in a somewhat dependent position. The consummation of a "completing and leasing" contract was prevented by a series of unexpected events, whose curious sequence has already been traced. The action of the Trustees seems, however, to have been reasonable and consistent throughout, and offers no ground for unfavorable criticism.

The history of the Railway can only be intelligently understood in the light of a small but persistent residuum of local hostility, largely responsible for the frequent vacillations of public opinion, and for the consequent delay in the completion of the road. Various elements contributed to its composition. Certain conservative interests,—retired capitalists and extensive property-owners, whose prospective advantages were more or less indirect,—opposed the project from the very outset. A limited number of public-spirited citizens conscientiously believed that the plan was unconstitutional, and that despite the decisions of the courts, it would ultimately be so declared. The friction inevitably incident upon the selection of Trustees and the location of route added a personal, and consequently a most bitter element of opposition. Finally, a larger class were, at best, indifferent to the success of the work, because the city "had no business to build a railroad." This vein of local hostility can be traced from the very inception of the project. Immediately after the publication of the Ferguson act an alternative plan of securing an amendment to the State constitution was agitated. The practical unanimity with which the Ferguson

act received popular endorsement silenced for a while all opposition. After the defeat of the first Kentucky act, it again revived, and continued active in the legal proceedings directed against the validity of the enabling acts. The insertion of prejudicial amendments in the Kentucky right of way grant was followed by an agitation for the repeal of the Ferguson act. So in turn came the enforced adoption of the "completing and leasing" theory, the embarrassments attending the negotiations of the first loan, the amendment of the "six million" act, and the subsequent exhaustion of funds, the renewed litigation of 1878, the defeat of the "first two million" act, and the limited authority conferred by the second. The same spirit, strengthened somewhat by popular dissatisfaction at the long delay in the completion of the Railway, culminated in May, 1878, in the passage of a joint resolution by the General Assembly of Ohio, authorizing the appointment by the Trustees of the Sinking Fund and the Board of Public Works of a commission of three persons, "to investigate into the condition of the affairs of the Cincinnati Southern Railway, to examine into the management of their trust and the disbursement of moneys entrusted to their care." A most searching inquiry into the operation of the trust from its creation was instituted. The records of the Board were examined in great detail and the personal testimony of the Trustees and many other persons interested was heard. The investigation extended over a period of nearly eight months, and not until early in 1879 was the report submitted, a voluminous pamphlet of some 240 pages, whose evidence has often been cited in the preceding paragraphs. The investigation may fairly be said to have been conceived and prosecuted in the spirit that there was something to be found out, dark and unholy things needing to be brought to light. Men even as fair-minded as the members of the Investigating Commission must in some degree have reflected the general sentiment. The report throughout is accordingly sharp and unsympathetic. The selection of Trustees, the negotiation of bonds, the "completing and leasing" theory, the failure of

negotiations with the Newport Bridge Company are smartly criticized. The conduct of legislation, the work of preliminary surveys, the selection of route receive endorsement. The tenor of the whole is fairly indicated in the faint praise with which the Trustees are finally damned: "The Trustees have made costly errors, for which a discriminating public judgment will scarcely hold them blameless, but it affords the commission pleasure to state that they have found no evidence going to show that any one of them has sought any pecuniary gain in violation of his trust."<sup>1</sup>

Both the cost of the road and the time consumed in its construction far exceeded popular expectation. It has been said with justice that "there were probably few persons who voted in 1869 to provide the line of railway who would have done so in anticipation of an expenditure of eighteen millions of dollars and a lapse of ten years before its completion."<sup>2</sup> When the Ferguson act was passed, whatever may have been the opinion of those immediately interested, it was generally believed that no further municipal aid would be required, and that in a few years the Railway would be open for through traffic. Mention has already been made of the various unexpected events,—legislative opposition, persistent litigation, the unknown character of the country, local unfriendliness, industrial depressions,—which delayed the completion of the road. The same reasons, combined with the failure to receive anticipated aid in Kentucky and Tennessee, and inability to effect a "completing and leasing" contract, would have rendered to some degree inexact, the most precise estimate of final cost made at the time of its projection. It seems, however, clear that no estimation of this kind was made, and that the sum of ten million dollars was inserted in the Ferguson act under the general impression that it would build the Railway. Some friends of the measure appear indeed to have realized that this sum would prove inadequate; but these felt, on the other hand, that it

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<sup>1</sup> *Report of Investigating Commission*, p. 49.

<sup>2</sup> *Ibid.*, p. 49.

was the heaviest strain which public sentiment would bear. The result of this inexactness, deliberate or otherwise, was unfortunate as far as the activity of the Trustees was concerned. The Board was invested by popular sentiment with the responsibility of completing the Railway for the amount provided in the original loan. The failure to do this engendered unfriendliness and distrust. Every subsequent loan brought additional hostility, and although the aggregate cost of the railway is relatively low, "less than the average cost of the well-built railways of this country," it was vaguely yet strongly believed in 1880, when the two million loan had been exhausted and details of completion still remained to be added, that there had been a great leak somewhere.

The testimony of experienced engineers and railroad experts agrees in characterizing the Railway as well built. The character of much of the work done was of a high order, superior to that ordinarily employed in Western railroad construction, and often described by contractors as "government work." Portions of the substructure have indeed been criticized as extravagantly built, and it is beyond a doubt that railroad connection, independent of the character of the road, could have been established between Cincinnati and Chattanooga by private enterprise for much less than the present work represents. A direct consequence of municipal construction, involving the possibility of municipal operation and liability, was that the Railway should be planned on a more substantial scale than if built by private enterprise. Whatever dissatisfaction this policy may have excited at the time, in view of the greater cost involved, subsequent experience has fully demonstrated its wisdom and shown that a road built for all time is, in the long run, the cheapest.

The 1881 lease of the Railway represents the final realization of the "completing and leasing" theory. An immediate source of revenue was provided and the city, at the same time, relieved of the cost and labor of detailed completion.

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<sup>1</sup> *Report of Investigating Commission*, p. 38.

The terms of the covenant were heartily approved by local sentiment and the action of the board of trustees generally commended.<sup>1</sup>

In the objective study of an institution, it is rarely possible to recognize personal elements. Yet any survey of the influences at work in the history of the Cincinnati Southern Railway would be imperfect without a clear recognition of the part contributed by a single personality, Mr. Edward A. Ferguson, the author of the original enabling act, and a member of the Board of Trustees since its creation. In so far as it is possible to speak of any large work as the product of a single agent, the Railway is to be associated with his name. The inception of the project, every piece of legislation, is traceable to his legal ingenuity. He is closely identified with the actual construction and ultimate disposition of the Railway, and but few details in its history fail to reveal the impress of his activity. Material interests, political preferment have been sacrificed, and a life of high possibilities devoted with rare unselfishness to this one end.

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<sup>1</sup> "The general feeling is that the Trustees have done a great and trying duty nobly. There need be no fear either, that they have been deceived in their parties. They have yet to get the worst of it in a money transaction with all the millions they have handled."  
—*Cincinnati Commercial*, Sept. 4, 1881.

## VII.

## MUNICIPAL RESULTS.

The magnitude of Cincinnati's undertaking is best revealed in the financial operations attending it. Within a period of ten years, four successive bond issues sharply swelled the indebtedness of the city by some eighteen million three hundred thousand dollars, and added an interest charge of one and a quarter million dollars to its annual expenditures.

The significance of this can be better appreciated by an exhibit of the municipal bonded debt for a somewhat longer period. The appended table shows the net liabilities of Cincinnati from 1864 to 1880:<sup>1</sup>

At close of	
1864.....	\$3,840,000.00
1865.....	3,203,000.00
1866.....	3,279,300.00
1867.....	3,459,500.00
1868.....	4,507,000.00
1869.....	5,020,000.00
1870.....	4,883,000.00
1871.....	5,363,000.00
1872.....	6,001,500.00
1873.....	6,143,500.00
1874.....	9,593,500.00
1875.....	17,325,500.00
1876.....	20,428,500.00
1877 (May 28).....	23,306,500.00
1877 (Dec. 31).....	22,830,500.00
1878.....	23,220,500.00
1879.....	23,856,330.00
1880.....	23,953,981.85

It is probable that the market value of the city's securities in general has been affected in some degree by the formal statute in force in certain States, that no institution of trust shall invest its funds in the securities of municipalities having more than a fixed per capita indebtedness.

<sup>1</sup> *Fifteenth Annual Report of Trustees of Sinking Fund*, 1892, p. 24.



The financial depression of the period, the exigencies of the Trustees, and the restriction to sale at par led in the negotiation of the loans to the use of long-term, high-interest, irredeemable bonds; hence, during the entire period of construction, the statutory provision for interest and sinking fund formed a most burdensome item in the municipal tax levy. This will be seen by reference to the appended statement:

Year.	Amount of Principal.	Amount of Interest.	Municipal Levy <sup>1</sup> (mills).	C. S. R. Interest <sup>2</sup> (mills).	C. S. R. Sinking Fund <sup>2</sup> (mills).
1873	\$200,000.00	\$7,000.00	14.45	2.50	.25
1874	1,700,000.00	68,000.00	16.00	4.70	.50
1875	5,700,000.00	304,500.00	16.00	7.20	1.00
1876	10,000,000.00	727,900.00	19.32	6.32 9.77	1.00 2.00
1877	16,000,000.00	1,133,843.82	20.70	10.85	1.30 2.30
1878	16,000,000.00	1,125,102.90	23.41	9.35	1.16 2.16
1879	17,000,000.00	1,176,800.00	23.92	7.37 10.45	1.16 1.91
1880	18,000,000.00	1,254,300.00	25.20	7.60 10.64	1.16 1.91

A large measure of relief came with the permanent lease of the Railway in 1881. Since then the amount to be raised by taxation has been very materially lessened by the annual rentals of the leasing company. Exchanges to a limited extent have also been effected at market rates of high interest construction bonds for four and five per cent. redemption bonds. This has increased the total bonded indebtedness of the city somewhat, but lessened the annual interest charge

<sup>1</sup> Includes levy for educational purposes.

<sup>2</sup> Prior to 1876 and occasionally thereafter, no distinct levies were made for the Cincinnati Southern Railway interest charge and sinking fund. To facilitate comparisons, two figures are given,—the upper referring to the special C. S. R. levies, the lower, in finer type, to the provision made for the total municipal indebtedness.

more than proportionately. The interest charge, the rental, the deficit and its relation to the municipal levy during this period, are as follows:

Year.	Amount of Interest. <sup>1</sup>	Rental of Railway. <sup>2</sup>	Deficit or Interest Charge.	Municipal Levy <sup>3</sup> (mills).	C.S.R. Interest (mills).	C.S.R. Sink'g Fund (mills).
1882	\$1,260,940.00	\$817,155.99	\$443,784.01	18.96	1.84	1.16
1883	1,265,962.50	815,548.78	450,413.72	16.00	2.82	1.10
1884	1,266,475.00	818,571.60	447,903.40	20.22	2.78	1.10
1885	1,267,049.00	818,758.00	448,291.00	20.64	3.42	.50
1886	1,267,561.50	828,777.50	438,784.00	19.14	2.33	.50
1887	1,268,074.00	918,830.00	349,244.00	20.84	2.11	.50
1888	1,278,734.00	919,828.51	358,905.49	20.61	2.15	.50
1889	1,272,584.00	921,507.00	351,077.00	20.59	2.15	.50
1890	1,272,584.00	921,507.00	351,077.00	20.24	2.15	.50
1891	1,272,584.00	921,507.00	351,077.00	21.75	1.53	.50
1892	1,272,584.00	1,021,507.00	251,077.00	20.96	1.48	.50

The unfortunate use of high-interest bonds, without option of earlier redemption, is emphasized by reference to the above table. Were the bonds redeemable, the loans could have been refunded long since at four per cent. and the city now be in receipt of an annual surplus of \$250,000, increased in 1896 to \$340,000, and in 1901 to \$500,000. As it is, not until 1901, when the rental reaches one and a quarter million dollars per annum, will the Railway become practically self-supporting. Thereafter its financial status seems reasonably assured. The first loan of ten million dollars expires in 1902. Refunded at four per cent., an annual net surplus of \$325,000 will revert to the city. The remaining loans fall due at intervals within the next five years. Assuming that they will be refunded upon no more favorable terms, and that the rental of the Railway will not rise above one and a quarter million dollars, this annual surplus should, nevertheless, increase in 1907 to more than \$475,000, and in 1909, when the last high interest loan will have expired, to more than \$525,000.

No account is here taken of an accumulating sinking fund, statutory provision for which was made in the several

<sup>1</sup> Includes terminal rents chargeable to railway.

<sup>2</sup> Includes profits on bond exchanges.

<sup>3</sup> Includes levy by Board of Education.

enabling acts, in accordance with the Ohio statute law governing the creation of municipal debts. A specific item for this purpose has appeared in every municipal levy since 1876, and a formal apportionment of the general sinking fund of Cincinnati, into which the moneys so realized have been merged, gave on January 1, 1892, \$3,437,247, as the amount available for the reduction of the Railway indebtedness.<sup>1</sup> This introduces a factor of the highest importance into the financial status of the Railway.

Assuming the retention of the present levy of one-half mill upon a valuation of \$185,000,000 (1891), or an annual increment of ninety thousand dollars, and cumulation at four per cent., the sinking fund available for the reduction of the ten million loan in July, 1902, when it falls due, will be, in round numbers, \$6,725,000. The residue, \$3,275,000, can be refunded at four per cent. or better, and the total interest charge thus be reduced to nearly \$675,000 per annum, leaving an annual surplus of about \$575,000 to the credit of the interest account of the Railway, available for defraying ordinary municipal expenditures. If the productive period of the road be delayed, as has been suggested, until January, 1909,—that is, if six years of the surplus, or \$3,450,000, be added to the new sinking fund of \$595,000,—the total indebtedness would be reduced in 1909, when the last construction loan expires, to \$7,830,000 and the annual interest charge to some \$315,000. Assuming no increase in rental, this would nevertheless mean an annual surplus of \$935,000. The same policy of independent financing continued for a term of years would permit the extinction of the entire debt in 1917, and leave Cincinnati in absolute possession of the Railway and in receipt of its gross rental revenue, estimated as certainly not less than one and a quarter million dollars. If the surplus receipts of the Railway beginning in 1902 are treated as ordinary municipal revenues, and the reduction of the bonded indebtedness left to the sinking fund alone, the interest charge would nevertheless fall in 1909 to some \$450,000 and the surplus increase to \$800,000.

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<sup>1</sup> *Sixteenth Annual Report of Trustees of Sinking Fund*, 1893, p. 6.

In either case the Railway will cease to be a burden upon the taxpayer after 1902, when the annual rental becomes practically equivalent to the interest charge. It has been proposed to treat the differences meanwhile occurring—\$358,000 per annum until 1898 and \$268,000 thereafter until 1902—as temporary deficits to be met by the issue of special long-term bonds, redeemable from out the surplus rentals of the road.

Whether the financial future of the Railway will actually proceed along these lines is uncertain. The railway loans differ radically in security and amplitude of basis from ordinary municipal debts, and are susceptible of distinct treatment. It has been shown how, independent of a sinking fund, the Railway will become self-supporting in 1902 and largely productive thereafter. There seems reason for believing that any extension or re-award of lease will provide for an annual rental certainly not less than that received in the last quinquennial term of the present contract, and that a sale will require the assumption by the purchaser of the entire construction indebtedness. The road is thus a permanent asset, able to provide for its own maturing liabilities. This fact has led to a gradual reduction in the amount of the municipal levy for sinking fund purposes. Hesitation is naturally felt against increasing an already too heavy municipal rate for the purpose of wiping out in fewer years the indebtedness of a productive property, fully capable of eventually working out its own financial salvation. The same reason may lead to the diversion of the Railway sinking fund from the purpose originally contemplated, to the more profitable reduction of general municipal indebtedness. The wisdom of such a step, for which specific legislation would be necessary, concerns the general field of municipal finance and need not be discussed in this connection. Attention is here simply called to the desirability of a distinct Cincinnati Southern Railway sinking fund account as long as a specific item for this purpose appears in the annual tax levy and no formal steps are taken towards the immediate or ultimate employment of the fund for other purposes.

It is necessary to remember that the immediate purpose of the construction of the Railway was to fortify the commercial position of Cincinnati and not to provide a new source of municipal revenue. Friends of the project were indeed convinced of its great possibilities in this direction, but the general sentiment was, that if the commercial advantages promised could be secured by any reasonable outlay, with a possibility, perhaps, of the Railway becoming ultimately self-supporting, the investment would be profitable.

As a means of commercial defense, the road has undoubtedly accomplished this purpose. The diversion of southern trade, threatened at the time of its inception, and in partial progress during the period of construction, was checked, and Cincinnati enabled to fairly compete in the distribution of northern goods to southern markets. This influence is generally recognized as the largest result attained by the Railway, and may be so accepted. Whatever difference of opinion exists as to the positive good accomplished by the construction of the road, sentiment is one in declaring that it has prevented very much harm.

It is difficult, indeed, to point out what has been the positive contribution of the Railway to the commercial development of Cincinnati. The American city is pre-eminently the product of diverse socio-economic factors. The various influences which have effected municipal growth lie upon the surface; but it is rarely possible to indicate with any precision the contribution of each particular force. The Cincinnati Southern Railway has become so completely an organic part of the economic life of the city whose name it bears as to be almost inseparably interwoven with other factors of municipal growth. Public sentiment recognizes that it has exerted deep and far-reaching influences upon commercial and industrial interests. Few Cincinnatians would hesitate at stating this fact in much more emphatic form. Yet the most intimate acquaintance with the economic history of the city cannot fortify such a conviction by mathematical demonstration, or express the favorable influence of the Railway in exact terms. Indeed, the data requisite for precise comparison are

lacking. The Railway has been built and the qualitative results of its operation are evident. But the condition of Cincinnati without such a road is conjectural, and it is literally impossible to indicate precisely what degree of present growth would have been attained independently, at least independent of municipal construction. Any comparison with the growth or development of other cities, with a view to ascertaining the influence of this one agency, is palpably misleading. Few American cities embody the influence of factors uniform enough to make possible the application of the logical method of difference. The difficulties here indicated are heightened by the fact that the influence of the Railway has been gradual and steady rather than immediate and abrupt. Upon the projection and during the construction of the railway, visionaries and enthusiasts dreamed of a fabulous visitation of prosperity to follow its opening. But clear-headed men even then recognized that no commercial revolution would be wrought, and that the natural advantages of Cincinnati as an industrial center would be emphasized, not transformed.<sup>1</sup> With these facts borne clearly in mind, the purpose of the following paragraphs,—to indicate the general trend of the economic influence of the Railway, rather than to demonstrate the precise results wrought,—will be better understood.

The industrial activity of Cincinnati, as of the ordinary American city, is twofold in character, conveniently described as “productive” and “distributive.” By “productive” is meant manufacturing establishments largely engaged in the conversion of raw materials. “Distributive” industries embrace so-called “jobbing” interests, or those employed in the wholesale distribution of commodities of local and other manufacture. The two activities are nowhere sharply separated, and in many industries are entirely merged. For the mere purpose of indicating the influence exerted upon each activity, the distinction however holds.

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<sup>1</sup> *Report on Internal Commerce of United States, 1876 : Appendix, p. 125.*

The immediate influence of the Railway upon the distributive interests of Cincinnati was to open up a wide range of new territory, to provide prompter transportation and better shipping facilities, and to place freight rates upon a more equitable basis. Large sections of the South from which the city had before been cut off were practically thrown open by the traffic arrangements effected upon the completion of the Railway, as hereinafter described. In addition, a wide region, undeveloped but rich in lumber and mineral wealth, was directly penetrated. Manufacturing towns and mining settlements sprang up along the line of the road, and Chattanooga underwent transition from a village to a city. The development of this section, forced for a while, but now proceeding along slower and more normal lines, has influenced the commercial interests of Cincinnati in marked though indeterminate degree.

Immediately upon the opening of the Railway, through tariff rates were established to southern, southeastern and southwestern points as far as Havana and Texas; a system of car exchanges with railroads penetrating the territory bounded by the Mississippi, the Gulf of Mexico and the Atlantic was arranged, and Cincinnati shipments placed without break of bulk or transfer in all southern markets. The absorption of the lessee company by one great trunk line, and later association with a second, have enlarged these opportunities, and as far as access to southern territory by means of railroad transportation is concerned, the present facilities of Cincinnati shippers are unrivaled.

Prior to 1880, freight rates between Cincinnati and competitive points in the South were fixed by adding an arbitrary charge to the rate between Louisville and such points. The tariff adopted upon the opening of the Railway was upon the basis that rates from Cincinnati to Chattanooga and the southeast, or "Atlanta territory," should be the same as from Louisville to such points. A protracted rate war resulted, ending in the final recognition of the principle urged by Cincinnati interests. The completion of the Railway effected

a less striking reduction in distance between Cincinnati and southwestern, or "Montgomery" territory, and in consequence a less marked reduction in freight rates. The change has, however, been material, and has been subsequently increased by the persistent efforts of the commercial bodies of Cincinnati. The extent of these modifications as compared with normal reduction in tariffs is indicated in the following statement:

<i>Cincinnati</i> <i>Chattanooga, Tenn.</i>	PER 100 POUNDS.												Per Barrel.	
	1st Class	2nd Class	3rd Class	4th Class	5th Class	6th Class	A Class	B Class	C Class	D Class	E Class	F Class	G Class	H Class
(a) Prior to opening Cin. South'n Ry.	.95	.83	.72	.53	.45	.39	.43	.39	.37	.33	.38	.66	1.34	.53
(b) In effect Sept. 1, 1880.....	.75	.66	.58	.41	.35	.30	.36	.31	.30	.26	.30	.52	1.12	.41
(c) In effect Jan. 1, 1882.....	.67	.60	.53	.46	.39	.32	.24	.33	.30	.28	.38	.58	1.00	.45
(d) In effect Jan. 1, 1892.....	.76	.65	.57	.47	.40	.30	.20	.26	.23	.19	.34	.38	—	.33
<i>Atlanta, Ga.</i>														
(a) Prior to opening of road.....	1.30	1.12	.94	.76	.63	.49	.51	.55	.56	.51	.55	1.02	1.88	.76
(b) In effect Sept. 1, 1880.....	1.10	.95	.80	.64	.53	.40	.44	.47	.49	.44	.47	.88	1.75	.64
(c) In effect Jan. 1, 1882.....	.95	.85	.75	.65	.55	.45	.34	.43	.39	.36	.52	.76	1.31	.61
(d) In effect Jan. 1, 1892.....	1.07	.92	.81	.68	.56	.46	.28	.35	.28	.24	.48	.48	—	.33
<i>Columbia, S. C.</i>														
(a) Prior to opening of road.....	1.30	1.12	.94	.76	.63	.49	.54	.68	.69	.64	.65	1.28	2.29	.76
(b) In effect Sept. 1, 1880.....	1.10	.95	.80	.64	.53	.40	.47	.60	.52	.46	.57	1.14	2.17	.64
(c) In effect Jan. 1, 1882.....	.95	.85	.75	.65	.55	.45	.36	.44	.40	.37	.58	.78	1.34	.67
(d) In effect Jan. 1, 1892.....	1.08	.92	.81	.68	.56	.46	.28	.42	.35	.32	.50	.64	—	.60
<i>Atlantic Coast Cities</i> <i>Savannah, Ga.,</i> <i>Charleston and Port</i> <i>Royal, S. C.</i>														
(a) Prior to opening of road.....	1.54	1.21	.94	.68	.54	.45	.62	.65	.65	.60	.60	1.15	2.17	.65
(b) In effect Sept. 1, 1880.....	1.46	1.10	.88	.74	.60	.51	.45	.47	.60	.55	.54	1.05	2.02	.55
(c) In effect Jan. 1, 1882.....	1.12	.93	.78	.66	.53	.44	.38	.38	.35	.35	.58	.69	1.24	.62
(d) In effect Jan. 1, 1892.....	.95	.80	.75	.70	.58	.46	.35	.35	.27	.23	.40	.46	—	.40
<i>Meridian, Miss.</i>														
(a) Prior to opening of road.....	1.28	1.05	.91	.78	.54	.54	.47	.47	.47	.44	.47	.94	1.54	.64
(b) In effect Sept. 1, 1880.....	1.18	.98	.87	.76	.54	.53	.44	.44	.45	.41	.44	.90	1.47	.59
(c) In effect Jan. 1, 1882.....	1.15	.96	.85	.74	.51	.51	.43	.43	.43	.38	.43	.86	1.38	.46
(d) In effect Jan. 1, 1892.....	1.22	1.02	.89	.75	.62	.54	.39	.41	.39	.32	.38	.66	—	.61



If in competitive trade, the differential cost of transportation forms a net industrial advantage, the result of these reductions with reference to the commercial interests of Cincinnati has been immense. An interesting attempt has been made by the Cincinnati Freight Bureau to determine this quantitatively. Upon the reasonable basis of three hundred working days in the year, and twenty car-loads of general merchandise (numbered classes) and one hundred car-loads of heavy freight (lettered classes) forwarded by all routes to southeastern territory, and the same amount shipped to the southwest,—it is calculated that the savings effected by the operations of the Railway from 1880 to 1892 aggregate \$11,046,000. Any exact determination of this kind must of course be taken approximately. In the main, however, the final proposition that “there should be entered to the credit of the Cincinnati Southern Railway an unrecorded dividend of more than ten millions of dollars”<sup>1</sup> seems valid and reasonable.

The influence of the Railway upon the productive interests of Cincinnati is more intricate. The opening of an undeveloped country, rich in natural wealth, cheapened the cost and enlarged the local supply of raw materials, such as iron, coal, lumber, stone, tan-bark and live stock. In the line of special manufactures, a market for which was already established, the cost of production has been lowered and the demand enlarged intensively. In the manufacture of general products, the reduction has not only made possible larger purchases by distributing agents, but given Cincinnati goods a footing in markets where advantages of proximity or natural power had before rendered competition impossible. A comparison of the annual production of important commodities for the years 1879-80 and 1888-90, that is, immediately before, and a decade after the completion of the Railway, shows striking changes:<sup>2</sup>

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<sup>1</sup> J. J. Hooker, *Discrimination in Freight Rates*. Published by the Cincinnati Freight Bureau, 1892.

<sup>2</sup> *Forty-first and Forty-second Annual Report of the Cincinnati Chamber of Commerce*, p. 66.

INDUSTRY.	1879-80.	1889-90.	INCREASE. per cent.
Iron (manufactures)..	\$19,368,719	\$30,422,139	57
Liquors.....	26,647,000	29,580,828	11
Clothing.....	18,695,844	28,631,789	53
Articles of Food.....	20,668,153	26,092,023	26
Productions from			
Wood.....	14,204,244	22,195,450	56
Leather and Leather			
Goods.....	11,338,735	15,118,040	33
Carriages, Buggies,			
etc.....	6,548,690	13,069,140	99
Metals other than iron	5,478,567	8,265,122	50
Printing and Publish-			
ing .....	4,401,735	7,039,489	59
Drugs, Chemicals.....	4,425,522	6,260,085	41
Paper and kindred			
goods .....	4,416,326	6,202,980	40
Stone and Earthen			
manufacture.....	2,559,510	5,510,354	115
Fine Arts.....	341,700	532,261	55
Bookbinding and			
Blank Books.....	826,827	1,457,150	76
Miscellaneous Indus-			
tries .....	8,181,206	15,480,516	89

Such a comparison, it is hardly necessary to add, possesses only a general and incidental value in this connection. No means are unfortunately available for showing in how far the pronounced increases are due to the building of the Railway. Colonel Sidney B. Maxwell, for some twenty years Superintendent of the Cincinnati Chamber of Commerce, and intimately acquainted with the commercial history of the city, declares that such an attempt is "like undertaking to show how far a man with strong, vigorous physical life owes it to systematic physical exercise," and adds, in explanation, that "so many influences have been at work to encourage development that it is impossible to indicate just how much vigor may be traceable to each industrial agency employed."

This is the testimony of all who have given thought or attention to the subject. The Railway is recognized as clearly the most fundamental and persistent factor that has contributed to the economic development of Cincinnati, and it is strongly believed that every branch of industry in the city has been more or less stimulated by its construction and developed by its operation. The complexity of industrial development renders any more precise statement impracticable.

It has been claimed that the construction of the Cincinnati Southern Railway has made an impression for good upon the transportation interests of the city beyond anything revealed in the amount of business transacted by the one road. This points to the most important of the influences that have followed indirectly from the completion of the Railway,—the attraction of other railroad systems to Cincinnati with the growth of the city as a distributing center. The Louisville, Cincinnati and Lexington Railroad, or the "Louisville Short Line," was early acquired by the Louisville and Nashville Railroad, and Cincinnati made the practical terminus of this entire system. Similarly, the acquisition of the Kentucky Central Railroad by the same system, and its extension to Knoxville, opened another route to Eastern Tennessee and Kentucky. The more recent extension of the Chesapeake and Ohio Railway, through the completion of the Maysville and Big Sandy Railroad, is thought to have been influenced by the operation of the Cincinnati Southern Railway,<sup>1</sup> although this is specifically denied by President Ingalls.

Finally, to be noted is the decided impress left by the construction and operation of the Railway upon the general public spirit of Cincinnati. This has manifested itself in the main along industrial lines. The Railway has never been a factor in municipal politics and has exerted no perceptible influence in this direction. The completion of a great work undertaken by public enterprise and prosecuted in face of almost insuperable obstacles has, however, infused a certain

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<sup>1</sup> Cf. "Cincinnati," by Mr. Murat Halsted in *Cosmopolitan Magazine*, October, 1891.

life and vigor into the economic activity of the city. It has developed a subtle consciousness of latent possibilities, strengthened industrial enterprise, and led to a larger use of new facilities than would otherwise have occurred. Commenting upon this, Col. S. B. Maxwell, whose testimony has already been cited, writes: "It is the revelation of an epoch in the business life of Cincinnati. Of course we cannot say that it is all traceable to the building of the Southern Railroad, but the stimulation growing out of the consummation of that great project has had more to do with it than anything else. Its influence permeated every walk of business life; it opened up to our people new possibilities; it created new ambitions; it set causes in motion which determined that Cincinnati was to become the great interior point of exchange between the North and the South. I undertake to say that there is not a department of business which has not felt the stimulation of these new conditions. It is not confined to such as have had to do directly with the South, but has reached all branches, just as vigorous bodily health gives tone and strength to each individual organ. I think there is no one who has given the subject careful consideration that does not know that a large part of the growth in business, in vigor and in faith which has been witnessed here in the past ten or twenty years is to be placed to the credit of this great railway to the South. The building of the road by the city was attended with hazard, but it would have been much more hazardous not to have built it. It increased taxation, but it secured a perpetual harvest of strength, vigor and enterprise. Great expenditures are sometimes the most judicious economy. It is wastefulness that should be avoided, not outlay. This is a very different city from what it was twenty years ago. It has passed from a provincial position to a metropolitan one; from circumscribed conditions, which, without early change, must have made themselves more dangerously felt in the future than in the past, to those encouraging aggressiveness and conquest, and from uncertainty to abundant faith in its resources and outcome."

A word as to the future of the Railway seems necessary. It will probably remain in the possession of Cincinnati for many years to come. Outright sale, even if desired, would require, as has been stated, additional enabling legislation in Ohio, Tennessee, and Kentucky, the unanimous consent of bondholders, and the ratification of electors of Cincinnati. The possibility of combined action is slight. The next few years, however, will probably witness some change in the present status of the Railway. It is generally recognized that a short-term lease fails to secure for the city the largest commercial benefits, in that it prevents the lessees from making the expenditures and insuring the obligations involved in the development of a great trunk line. Any forecast is hazardous; yet public sentiment appears to be crystallizing in favor of some such form as that recommended by the commercial bodies of the city in 1889,—a perpetual or long-term lease at an annual rental, not less than that paid during the last term of the present lease, and with specific provisions that when gross earnings exceed a certain sum per mile, a fixed per centum of the excess shall revert to the city as increased capital; furthermore, that freight charges between Cincinnati and specified southern points should never exceed a certain per centum of the rates between New York and these points.

Whatever action may be taken, there seems reason for viewing the future with some degree of confidence. Properly administered, the Railway can work an entire revolution in the finances of Cincinnati. Very manifest is a growing tendency in public opinion to appreciate the sacrifices involved in its construction, its vital connection with the material interests of the city, and the necessity for exercising the strictest watchfulness with respect to its control and disposition. A recent judicial decision retains the Board of Trustees in charge of the Railway as long as the city remains its beneficial owner, the court here declaring that "a railroad several hundred miles in length, costing millions of dollars and which, under some arrangement, may probably remain the property of the city for all time to come, stands on a very

different footing from the mere erection of a courthouse or an armory”<sup>1</sup> by specially appointed commissioners, whose office clearly and expressly terminates with the completion of the structure. The character of the Board of Trustees, its clearly defined powers, the responsibility of individual members to the appointing court, the probable necessity of further ratification by a second municipal board, justify the belief that the ultimate disposition of the Railway will be as free from undue influences as were its construction and initial lease.

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<sup>1</sup>City of Cincinnati *vs.* Trustees of Cincinnati Southern Railway and the Cincinnati, New Orleans and Texas Pacific Railway Company, Lessee ; in Circuit Court of Hamilton County, December 19, 1891.

## APPENDIX.

## A.

AN ACT RELATING TO CITIES OF THE FIRST CLASS HAVING A POPULATION EXCEEDING ONE HUNDRED AND FIFTY THOUSAND INHABITANTS.<sup>1</sup>

(8307) SEC. 1. *Be it enacted by the General Assembly of the State of Ohio*, That whenever, in any city of the first class having a population exceeding one hundred and fifty thousand inhabitants, the city council thereof shall, by a resolution passed by a majority of the members elected thereto, declare it to be essential to the interest of such city that a line of railway, to be named in said resolution, should be provided between termini designated therein, one of which shall be such city, it shall be lawful for a board of trustees, appointed as herein provided, and they are hereby authorized to borrow, as a fund for that purpose, not to exceed the sum of ten millions of dollars, and to issue bonds therefor in the name of said city, under the corporate seal thereof, bearing interest at a rate not to exceed seven and three-tenths per centum per annum, payable at such times and places, and in such sums, as shall be deemed best by said board. Said bonds shall be signed by the president of said board, and attested by the city auditor, who shall keep a register of the same, and shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax, which it shall be the duty of the council thereof annually to levy, sufficient, with said net income, to pay the interest and provide a sinking fund for the final redemption of said bonds; provided that no money shall be borrowed on bonds issued until after the question of providing the line of railway specified in the resolution shall be submitted to a vote of the qualified electors of said city, at a specified election to be ordered by the city council thereof, of which not less than twenty days notice shall be given in the daily papers of the city; and further provided, that a majority of said electors, voting at such election, shall decide in favor of said line of railway. The returns of said election shall be made to the city clerk, and be by him laid before the city council, who shall declare the result by a resolution. The bonds issued under the authority of this section shall not be sold or disposed of for less than their par value.

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<sup>1</sup> Passed and took effect May 4, 1869 : 66 Ohio Laws, p. 80.

(8308) SEC. 2. If a majority of the votes cast at said election shall be in favor of providing the line of railway as specified in the first section, it shall be the duty of the solicitor forthwith to file a petition in the superior court of said city, or, if there be no superior court, then in the court of common pleas of the county in which said city is situate, praying that the judges thereof will appoint five trustees, to be called the trustees of ——— railway (the blank to be filled with the name given to the railway in the resolution); and it shall be the duty of said judges to make the appointment, and to enter the same on the minutes of the court. They shall enter into bond to the city in such sum as the court may direct, with one or more sufficient sureties, to be appointed (approved) by the court, conditioned for the faithful discharge of their duties. The bond so taken shall be deposited with the treasurer of the corporation for safekeeping.

(8309) SEC. 3. The said trustees and their successors shall be the trustees of the said fund, and shall have the control and disbursement of the same. They shall expend said fund in procuring the right to construct, and in constructing a single or double track railway, with all the usual appendages, including a line of telegraph between the termini specified in the said resolution; and for the purposes aforesaid shall have power and capacity to make contracts, appoint, employ and pay officers and agents, and to acquire, hold and possess all the necessary real and personal property and franchises, either in this state or in any other state into which said line of railway may extend. They shall also have power to receive donations of land, money, bonds and other personal property, and to dispose of the same in aid of said fund.

(8310) SEC. 4. The said trustees shall form a board, and shall choose one of their number president, who shall also be the acting trustee, with such power as the board may by resolution from time to time confer upon him. A majority of said trustees shall constitute a quorum, and shall hold regular meetings for the transaction of business, at their office in the city under whose action they are appointed, but they may adjourn from time to time to meet at any time and place they may think proper. They shall keep a record of their proceedings, and they shall cause to be kept a full and accurate account of their receipts and disbursements, and make a report of the same to the city auditor annually, and whenever requested by a resolution of the city council. No money shall be drawn from said fund but upon the order of said board, except their own compensation, which shall be paid out of the same upon the allowance of the court appointing them, and shall be proportioned according to their respective services.



(8311) SEC. 5. Said trustees shall have power to take such security from any officer, agent or contractor, chosen, appointed or employed by them, as they shall deem advisable. They shall not become surety for any such officer, agent or contractor, or be interested directly or indirectly in any contract concerning said railway. They shall be responsible only for their own acts.

(8312) SEC. 6. Whenever the city solicitor of any city under whose action a board of trustees has been appointed as herein provided, shall have reason to believe that any one of said trustees has failed in the faithful performance of his trust, it shall be his duty to apply to the court that appointed said trustee, by petition, praying that such trustee be removed, and another appointed in his place; and when a vacancy shall occur in said board from any other cause, it shall be filled in like manner. If the said city solicitor shall fail to make application in either of the foregoing cases, after request of any holder of the bonds issued by said trustees or by a taxpayer of the corporation, such bondholder or taxpayer may file a petition in his own name on behalf of the holders of such bonds for like relief, in any court having jurisdiction, and if the court hearing the action shall adjudge in favor of the plaintiff, he shall be allowed as part of his costs, a reasonable compensation to his attorney.

(8313) SEC. 7. Whenever in the construction of a line of railway as herein provided, it shall be necessary to appropriate land for the foundation of the abutments or piers of any bridge across any stream within or bordering upon this state, or for any other purpose, or to appropriate any rights or franchises, proceedings shall be commenced and conducted in accordance with the act entitled "An act to provide for compensation to the owners of private property appropriated to the use of corporations," passed April 3, 1852, and the acts supplementary thereto, except that the oath and verdict of the jury and the judgment of the court shall be so varied as to suit the case.

(8314) SEC. 8. Whenever there shall be between the termini designated in any resolution passed under this act, a railroad already partially constructed, or rights of way acquired therefor, which can be adopted as part of the line provided for in said resolution, the trustees of said line may purchase the said railroad and right of way and pay for the same out of the trust fund.

SEC. 9. The said trustees shall have power, as fast as portions of the line for which they are trustees are completed, to rent or lease the right to use and operate such portions upon such terms as they may deem best; but such rights shall cease and determine on the final completion of the whole line, when the right to use and

operate the same shall be leased by them to such person or company, as will conform to the terms and conditions which shall be fixed and provided by the council of the city by which the line of railroad is owned.

(8315) SEC. 10. The city council of any city passing a resolution as provided in the first section, may appropriate and pay to the said trustees, out of the general fund of said city, such sum as may be necessary for defraying the expenses of the election, and said sum shall be repaid out of said trust fund when raised.

SEC. 11. This act shall take effect on its passage.

B.<sup>1</sup>

ANN ARBOR, MICHIGAN, April 17, 1869.

A. E. MACOMBER, ESQ.

*Dear Sir:*—The question you propose regarding the power of cities in Ohio to construct works of internal improvement, with legislative permission, seems to me one which the judicial decisions of your State have already settled. An unbroken series of those decisions has declared that, in the absence of any express constitutional inhibition, it is competent for the legislative authority of the State to authorize municipalities to lend moneys under the taxing power and appropriate the same in aid of railways and other great thoroughfares. This would only be permissible on the ground that the municipalities have an interest in the construction of such works so direct and immediate as to render it proper that the sovereign power of taxation should be exerted by them for the purpose, as it might be for the highways entirely within their limits. Hitherto the power has been employed in aid of corporations, and the municipalities have either taken stock in such corporations, or have made to them loans of credit or money. Your revised constitution forbids this by providing that "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company, corporation or association."

This provision, however, only prohibits the municipalities giving aid to works of public improvement in the modes before resorted to.

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<sup>1</sup>FURGUSON RAILWAY ACT. *Views of Press, Address of Committees, Action of Board of Trade and Chamber of Commerce, etc.* (Cincinnati, 1872: published by the Board of Trustees), p. 64.

and there is nothing in it to prevent, or that appears designed to prevent, the local authorities from levying taxes for the construction of railroads when their own agencies are employed for the purpose. Indeed, it was always felt that there were objections in principle to cities, town and counties becoming stockholders in corporations, or loaning money or credit to corporations, in order to secure the construction of works of public importance to the locality, which did not exist where the municipality took the construction of the work into its own hands, as it would have done if it had been a street or any other purely local work. To allow the municipal authorities to give aid to private corporations in order to secure the construction of a public work was unquestionably to introduce a new feature into the system of local self-government, while to authorize the local authorities to construct the same work themselves would be in entire harmony with the established principles and usages. It is very clear, I think, under the decisions of your Supreme Court, that prior to the new constitution it would have been entirely competent for the legislature to permit the local authorities to levy taxes for the construction of railroads to be managed and controlled by their own officers or agents, and it seems equally clear that the clause above quoted from the constitution does not take away this power. You inquire if it would be otherwise if the road when constructed was to extend beyond the limits of the State. I think not, conceding, as your courts have repeatedly declared, that the municipalities may be allowed to expend taxes on roads outside their own limits. I know nothing to confine the expenditures to the limits of the State. The local importance of the road which justifies an exercise of the power of taxation to construct does not depend upon the question whether it is entirely within the State or not, but upon the local facilities it affords to travel and commerce.

Very truly yours,

(Signed) T. M. COOLEY.

## C.

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III

THE CONSTITUTIONAL BEGINNINGS OF  
NORTH CAROLINA

(1663-1729)



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE  
HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

III

THE CONSTITUTIONAL BEGINNINGS OF  
NORTH CAROLINA

(1663-1729)

BY JOHN SPENCER BASSETT

*Fellow in History, J. H. U.; Professor Elect of History in Trinity College,  
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A DISSERTATION PRESENTED TO THE BOARD OF UNIVERSITY STUDIES OF  
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J. S. B.

*February 20. 1894.*



## CONTENTS.

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CHAPTER I.—*Introduction*: General features of the Proprietary Period; Development of Civil Liberty; Economic and Social Conditions. p. 9.

CHAPTER II.—*The Source of the Constitution of North Carolina.* *Section I.*—The King's Idea of a Colony. *Section II.*—The Palatinate Franchise. *Section III.*—The County Palatine in America. p. 17.

CHAPTER III.—*The Proprietors and the Constitution.* *Section I.*—The Legal Status of the Lords Proprietors. *Section II.*—The Proprietors' Theory of Government—The Fundamental Constitutions. p. 30.

CHAPTER IV.—*The Analysis of the Constitution.* *Section I.*—The Lords Proprietors. *Section II.*—The Governor. *Section III.*—The Council. *Section IV.*—The Assembly. *Section V.*—The Judicial System. *Section VI.*—Finances. *Section VII.*—Miscellaneous Officers. p. 44.

## SOURCES OF INFORMATION.

"The Colonial Records of North Carolina," edited by Col. W. L. Saunders; Vols. I., II. and III. This has been our chief source. In its volumes we have found letters of instruction, reports of officers, laws, court records, and various other documents. The nature of the work in hand has rendered it necessary to depend more on these materials than on the several narrative histories of the State, although valuable general knowledge has been gotten from the latter.

"Laws of North Carolina": printed by James Davis, 1752.

"History of North Carolina": F. L. Hawks; 2 vols. (1584-1729). Volume II. of this work deals with the Proprietary period and is without doubt the best treatment of the subject that has appeared.

"Political Annals of the United Colonies": George Chalmers; 1780. This work was based on original authorities, but contains little for us that cannot be found in better shape in the "Colonial Records." Its chapter on Carolina is reprinted in Carroll's "Historical Collection of South Carolina," Vol. II.

On Durham County :

Surtees: "History of the County Palatine of Durham."

Publications of the Surtees Society, particularly Vols. 32. 82. and 84.

We have also consulted in a general way :

Williamson: "History of North Carolina."

Martin: "History of North Carolina."

Winsor: "Narrative and Critical History," Vol. V., in which is reprinted Rivers' sketch of the early history of Carolina.

Doyle: "English Colonies in America."

John Lawson: "Exact Description of the Natural History of North Carolina," 1709.

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Other works have been used for specific purposes. These are indicated in footnotes, which, it is hoped, will be found as ample as is desirable.



## CHAPTER I.

## INTRODUCTION.

The Proprietary government of North Carolina began in 1663, with the royal grant, and ceased in 1729, with the sale of the entire property to the Crown. The eight noblemen who, by the royal favor, were constituted its "true and absolute lords and proprietors," proceeded in 1665 to outline the plan by which they proposed to administer the civil affairs of their property.<sup>1</sup> Their design was to create for the time certain distinct governments, each directly dependent on the Proprietors. These they designated "counties." Three counties were actually organized. They were: (1) Albemarle, a region north of Albemarle Sound, and containing 1600 square miles; (2) Clarendon, the district to the south of the mouth of the Cape Fear; and (3) Craven, the territory immediately south of Cape Romaine.<sup>2</sup> Over each county was placed a Governor, with the necessary administrative associates.

With Craven and Clarendon counties we have here nothing to do; for the one lay wholly without the region that later became North Carolina, and the other, though within that territory, was soon abandoned, that its inhabitants might unite with those of Craven county to build up the more prosperous colony of South Carolina.

Our inquiry lies particularly with Albemarle county. This government, though at first the smallest of the three, gradually extended its authority over the neighboring districts, until at the end of the seventeenth century it became known as North Carolina, and embraced all that part of the province that lies north and east of Cape Fear. The original county was divided into precincts, and, along with other counties

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<sup>1</sup> Col. Records of North Carolina, I., 79.

<sup>2</sup> *Ibid.*, I., 93.

## 10 *Constitutional Beginnings of North Carolina.*

that were subsequently created on the same plan, continued to exist till 1738, when the larger division was abolished, and in its place the old precinct, which was now known as a county, became the regular local administrative and judicial unit.<sup>1</sup>

In 1691 the Proprietors seem to have thought that their progress in planting colonies was sufficient to warrant a union of the several settlements into one government. They accordingly appointed for the whole colony one Governor, known as the Governor of Carolina, who, with one Council and one Assembly, was to direct the government of all Carolina.<sup>2</sup>

This was, doubtless, a previously arranged plan for gradually bringing into use the Fundamental Constitutions. It certainly took a step toward the general provisions of that instrument. The only practical result was the division of the province into North and South Carolina. Whatever irregularly defined counties might have existed before this, they were now integrated, not into one, but into two, governments.<sup>3</sup> It was the large tract of unsettled country lying between Charleston and Albemarle Sound that caused this division. On second thought, the Proprietors agreed that if Albemarle found it inconvenient to send delegates to the Assembly at Charleston, the Governor might establish in the northern county a separate government, with such powers as he saw fit to confer.<sup>4</sup> Thus a Deputy Governor, appointed by, and reporting to, the Governor of Carolina became the head of the government in Albemarle.

This state of affairs continued from 1691 to 1710. There being no direct communication between the North Carolina

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<sup>1</sup> Williamson : Hist. of N. C., I., 163 ; also Laws of 1752, pp. 86, 90.

<sup>2</sup> Col. Recs. of N. C., I., 373-380.

<sup>3</sup> The Proprietors claimed that there were four counties : Albemarle, Craven, Berkeley, and Colleton. Only Albemarle was in North Carolina, and in South Carolina only Craven had been definitely organized. See Col. Recs. of N. C., I., 377.

<sup>4</sup> See Col. Recs., I., 380-1. Chalmers says, rather disparagingly, that North Carolina "refused to join in legislation with their southern neighbors." Chalmers : Hist. of the Revolt, I., 398.

authorities and the Proprietors, we have but scant records for the period. One result is observable, however. The people, left largely to themselves, gained a greater influence in the government. The popular influence began to overmaster the Proprietary interest, and the colony became for a short time peaceful and happy.

In 1710 the Proprietors resolved that "a Governor be made for North Carolina independent of the Governor of South Carolina."<sup>1</sup> This action is in danger of being spoken of as the separation of North and South Carolina; but there was never any organic union between the two colonies. When the Governor of Carolina was instructed to appoint a Deputy Governor for North Carolina he was directed to appoint a similar officer for the southern colony. These two were therefore entirely co-ordinate in authority. From the fact that the Governor of Carolina usually appointed his deputy for North Carolina and lived in more populous and more cultured South Carolina, which he often ruled in person, the idea has sometimes appeared that the Governor of the northern colony was dependent, not on the Governor of Carolina, but on the Governor of South Carolina.

From 1712, the time of the settling of affairs under the revived independent Governor, the colony remained prosperous and peaceful. The Lords relaxed their design of making a constitution for the people and allowed them practically to devise their own laws. That faction of the inhabitants which favored the Proprietors managed to hold the Assembly, and by a wise use of their power brought about

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<sup>1</sup> There is something unexplained about this event. Our quotation is taken from the minutes of a meeting of the Proprietors (Col. Recs., I., 750). This occurred Dec. 7, 1710. Eight days later the Governor of Virginia addresses Hyde as Governor (*Ib.*, I., 750). Hyde must have been recognized in the colony before he was appointed by the Lords (cf. Hawks, II., 517). Hyde seems to have depended on a commission from Tynte, the Governor of Carolina, who dying at this time, the new Governor was obliged to have a commission from the Proprietors, which was issued, Jan. 24, 1712 (Col. Recs., I., 841). Hawks adopts the latter date as the beginning of Hyde's term (Hist. of N. C., II., 493).

## 12 *Constitutional Beginnings of North Carolina.*

some good laws and, until just before the close of the Proprietary period, much good feeling.

With regard to the development of civil liberty, the results of our investigation fall into three stages. These are: (1) the period of infancy, (2) the period of physical struggle, and (3) the period of constitutional reform.

The period of infancy is only important as giving a starting-point. It was co-existent with the system of government organized under the Concessions of 1665,<sup>1</sup> and was superseded in 1670 by those constitutions which were temporarily to take the place of the Fundamental Constitutions. In the minds of the Proprietors the Concessions themselves were doubtless intended to be temporary, but there is no evidence that any such intentions were communicated to the settlers. The leading characteristic of the period is the tutelar nature of government. The Proprietary influence was at its height, and from this state of freedom, or non-freedom, the growth of civil liberty began.<sup>2</sup>

The second period, however, is of more importance. All States in which liberty has proceeded by any regular growth from authority to equality have begun the process with a period of physical struggle. North Carolina was no exception to this rule. From 1670 to 1712 her people, according to Colonel Saunders, drove from office six of their fourteen Governors.<sup>3</sup> During this time there were two actual rebellions, and the inhabitants were kept in a constant state of unrest. Governor Spotswood, of Virginia, remarked, rather spitefully, that the people were so used to turning out their Governors that they thought they had a right to do so.<sup>4</sup>

The first of these troubles, the "Culpeper Rebellion," came soon after the arrival of the Fundamental Constitutions,

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<sup>1</sup> Col. Recs., I., 79.

<sup>2</sup> The Proprietors' government was definitely established in Albemarle in 1664, about three months before the Concessions. Before this there had been a few people there, mostly Virginians, who held their lands from the Virginia government or from the Indians.

<sup>3</sup> Col. Recs., II., p. x.

<sup>4</sup> *Ibid.*, II., p. x.

and it has, therefore, been customary to say that the troubles of the period arose from an attempt to enforce that system. This appears not to be true, and for two reasons: (1) The Proprietors did not attempt to enforce the Constitutions as such in North Carolina; and (2) whenever there is trouble there is always assigned a sufficient cause—and a cause which has nothing to do with the Constitutions. Not one fact, but several facts, caused the various struggles of the people against their rulers. The three most marked grievances were the attempt to enforce the navigation laws, the scheme to introduce the established church, and dishonest or inefficient Governors. To this should, perhaps, be added a certain amount of demagoguery, an element which is always plentiful where an oppressed people are ignorant and for a considerable part of their time unemployed.

The excesses of this period brought the colony the reputation of being lawless. This imputation is more easily justified than denied. The people had real grievances. Unused to the formalities of law, and, under the Proprietors' system of government, having but little opportunity for a legal redress of grievances, they struck for relief by what seemed to them the nearest and surest method—by physical force. While it cannot be denied that their resistance largely influenced the liberal settlement of the government in the Revisal of 1715, still it must be admitted that relief would have come sooner and with less discredit to the fame of the province had the difference been fought out in a constitutional manner.

The third period may be said to have begun with the settlement of internal affairs after the "Carey Rebellion"—say about the end of 1711. It ended, so far as this work is concerned, in 1729. It was a period of constitutional struggle. The marked improvement on the former period was brought about by a union of two causes. First, the people had come to see the futility of employing force. They observed that such tactics had but put their opponents into office and had weakened the colony against Indians. Secondly, the Pro-

prietors on their part came to adopt a more liberal policy towards the settlers. They allowed the code of 1715 to take the place of the shadowy and indefinite system of 1670 which they had vaguely embodied in their instructions to successive Governors. Thus they themselves were largely removed from the administration of affairs, and their Governors, especially Eden, seem to have been inclined to get along with the people as easily as possible.

As a consequence, all struggle ceased for more than a decade, and when it did re-appear amid the confusion of the closing days of the Proprietary regime, it was methodical and constitutional. The Assembly's calm but firm manner of asserting its rights at this period suggests all the dignity of the English Parliamentary battles of the seventeenth century. The struggle thus begun was carried over to the period of the royal province, and was not finally allayed till North Carolina became a State.

There is one fact in the early history of North Carolina that makes it unique among all the Southern colonies. That fact lies in the economic conditions of the early settlement. Two forces tended to keep it a poor colony, thus giving a turn to its later character. In the first place, it was the policy of the Proprietors to grant the land in small holdings, six hundred and forty acres being usually the maximum quantity. Only a few persons, the hereditary nobility for the most part,—and in North Carolina these were rare indeed,—could acquire larger continuous tracts.<sup>1</sup> By this means land-

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<sup>1</sup> As early as 1669 the Assembly passed a law which for five years restricted land-holdings to 660 acres. This law did not extend to Proprietors, Landgraves and Caciques. It was made to prevent dispersion of the inhabitants over a very large area. (See Col. Recs., I., 186.) The amount a man might then take up without purchase was 60 acres for himself and 50 or 60 acres for each person he brought in with him. Later it was 50 acres, without distinction, for each person that came in. One must therefore be a considerable man to secure at any time more than 1000 acres (*Ib.*, I., 182). In 1709, if not earlier, the Proprietors declared that no more than 640 acres should be sold to one man without their written permission (*Ib.*, I., 706, also I., 846, and II., 457). In 1702 it had been restricted to 500 acres (*Ib.*, I., 556). Brickell says it was 640 acres in 1737 ("Natural Hist. of N. C.," p. 12).

owners were not powerful. In Virginia and in South Carolina, where it was the custom to make large grants, a predominant landed aristocracy soon sprang into existence. Situated in the midst of slaveholding States, North Carolina has not entirely escaped the influence of its environment. It has always been distinctly Southern, but only mildly aristocratic. It has at no time been dominated by a few powerful families.

In the second place, the earliest settlements in the State were in that part where uncertain harbors prevented a direct trade with England. The settlers were thus left to an unprofitable commerce with the older communities in America. No extensive industry became established. The people were isolated, and produced but little more than they could consume. Thus this colony, with perhaps the most fertile soil on the Atlantic coast, lagged behind in material prosperity.

To these two economic facts we must add a fact of a social nature, before our view can be considered complete. North Carolina was often turbulent. Whether it was for good reasons or for bad, there was frequent social disorder within its borders. As has been said, bad administration was to some extent responsible for this, but back of this cause lay the condition of the masses. There was little religious instruction and less education. There was not a printing press in the province.<sup>1</sup> Governor Burrington's statement in 1732, that there was not in the province "a sufficient number of gentlemen fit to be councillors, neither to be Justices of the Peace, nor officers in the militia,"<sup>2</sup> must be understood as a partisan utterance, yet it was not without a color of truth. The Virginians charged repeatedly that North Carolina, by shielding immigrants from prosecution for debts contracted before coming into the colony, became an asylum for the vicious classes, and it cannot be denied that such a law would bring some undesirable citizens into the colony.

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<sup>1</sup>The first printing press was introduced in 1749. Wheeler : Hist. of N. C., I., 112, and Martin : Hist. of N. C., II., 54.

<sup>2</sup>Col. Recs., III., 332-3.

## 16 *Constitutional Beginnings of North Carolina.*

Yet that does not seem sufficient. It is more probable that the economic disadvantages of small estates and of the lack of commerce induced the better class of immigrants, those who possessed means, to go to Virginia or to South Carolina, thus leaving North Carolina for less substantial settlers.



## CHAPTER II.

### THE SOURCE OF THE CONSTITUTION OF NORTH CAROLINA.

#### SECTION I.—*The King's Idea of a Colony.*

In the private note-book of Henry VII. of England appears this entry: "10th August, 1497. To him that found the new isle, £10." This, it is supposed, refers to John Cabot's discovery of the American continent. If the assumption be correct, it means that the frugal king, at the moderate expense of ten pounds, gained for his private property the entire Atlantic coast from Labrador to Florida.

If to-day a region of unsettled country suddenly became American soil, we should expect it to be received and granted out to settlers in the name of the American people. But in regard to Cabot's discovery an entirely different method was followed. It was a doctrine of the English law that all land not otherwise occupied was the property of the king; that is to say, it was Crown Land, or *terra regis*, as the legal phrase ran. The king could dispose of such land as he saw fit. As a matter of fact, his American possessions were divided into what was afterward known as colonies, and each of these was settled in one of three ways. Thus there came to be proprietary, charter, and royal colonies.

The *proprietary colony* was the method of colonization that first suggested itself to the English sovereign.<sup>1</sup> This meant that some individual or corporation received the lands it was intended to populate, and with them the right to maintain the government over the inhabitants who settled there. The Proprietary took the position of the king in reference to

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<sup>1</sup> Gilbert and Raleigh received their patents as proprietaries. Virginia began under such a system of royal interference that the government was neither proprietary nor royal, but within three years went into the hands of a company that was really a proprietary. See Bancroft, Part I., chaps. VI., VII.

## 18    *Constitutional Beginnings of North Carolina.*

the colony. He was responsible to no one except to his sovereign. It is interesting to note that this institution was analogous to the old mark and county palatine, by which early Germanic emperors had held their turbulent frontiers. Similar conditions in the sixteenth and seventeenth centuries suggested a similar method of meeting them.

The *charter colonies* existed in New England. Hither the king allowed a number of Dissenting congregations to come, in order that they might worship God as they chose. These colonies cannot be said to be embraced in the colonizing scheme of the English kings. So far as the monarch was concerned, they existed by sufferance. They had their liberties guaranteed by a royal charter, and were, in many respects, closely analogous to the English towns on the royal domain.

The king held a kind of reversion on both of these kinds of colonies. If it happened that the conditions on which they were then held were violated, the king might sue for and recover possession of them. It did come about that on various pretexts the Crown succeeded in getting the courts to remit into its hands several of the colonies, which were accordingly known as *royal provinces*. It will be noticed that this method was not in favor as a means of planting colonies. There is not one of the English planted colonies in the limit of the present United States in regard to which the king can be considered to have said to himself: "Go to, I will make me a colony." He chose rather to make some other person's colony his own.

Let us ask now: "Whence came the constitutions of these colonies?" Here writers are by no means unanimous. One class holds that our institutions were taken bodily from our English home; another claims that they were a product of the American soil; while still another, taking a middle view, think that they represent a complex process in which selection and growth both appear.

A mistake that has too often been made in this connection—as elsewhere, when writing of American institutions—is to

look at the whole field from the standpoint of the New England colonies. These colonies, left largely to themselves, had ample opportunity to develop their institutions in their own way; and, in truth, their constitutions were more characteristically American, in our present use of the term, than those of any other colonies. Outside of New England the forms of government were, in most cases, sent in the first instance from England. They came from men who, for the most part, had never been in America, and who, in many cases, had purposes in view which were foreign to the purposes of the colonists.

If we are to understand these constitutions we must remember that they were not uniform. Each Proprietor had his own ideas of government. Each may be supposed to have consulted existing models before devising his own system. Wise old William Penn had been doing this when he wrote in the preface to his "Frame of Government": "I do not find a model in the world that time, place, and some singular emergencies have not necessarily altered; nor is it easy to frame a civil government that shall serve all places alike." This idea is also well illustrated in the governments of Maryland and of North Carolina. Here the two royal charters were almost identical, and yet the administration of the provinces differed widely. The differing was due to the personal equation of the two proprietaries.

With such varying factors to be reckoned with, one cannot say in any general way where the American institutions originated. All that a cautious person will say is that after careful research he thinks that the constitution of a given State originated in a certain specified manner.

So far as North Carolina is concerned, it is the opinion of the present writer that its general form of government was modeled after the English manorial organization. Let us explain what we mean by manorial organization. There was in England, until the days of modern reform, two local juris-

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<sup>1</sup> Proud : Hist. of Penn., I., p. 197.

dictions. On the one hand was the authority of the king, exerted through the sheriff in the county and through the reeve in the township; on the other hand was the authority of the lord of the manor, exercised either in person or through his steward. The one stood for the people and the people's leader, the king; the other stood for the land and for the land's owner, the lord. The one was expressed tangibly in the jurisdiction of the township and of the county; the other, in the private jurisdiction of the courts baron and leet. Now it is the latter institution that we mean by the manorial organization; that is to say, that system by which the lord of the land was constituted the lord of the civil affairs of those who lived on the land. And of these two institutions it was, we think, the latter that was imitated by the builders of the government of Proprietary North Carolina.

But it was not the simple English manor that was copied. It was, rather, the County Palatine—in point of authority the highest form of the manor. The most patent reason for saying this is a clause in the royal grant itself. By this it was declared that the Proprietors should “have, hold, use, exercise, and enjoy the same [their privileges] as amply, fully, and in as ample manner, as any Bishop of Durham in our kingdom of England ever heretofore had, held, used, or enjoyed, or of right ought, or could, have, use, or enjoy.”<sup>1</sup> It was also provided that the property should be held, at an annual rent of twenty marks, “as of our manor of East Greenwich, in Kent, in free and common socage and not in capite, or by knight's service.”<sup>2</sup> Furthermore, it will be seen on examination that when the Proprietors organized their property they carried into effect the features of the Palatinate organization. The Fundamental Constitutions, which were not enforced, and the temporary constitution, which was enforced, both strongly suggest the lord of the manor. In either case the Lords were the source of all real power. They appointed their executive agents; their own courts adminis-

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<sup>1</sup> Col. Recs., I., 103.

<sup>2</sup> *Ibid.*, I., 104.

tered their own justice or preserved the Proprietors' peace; even the Assembly was a kind of court-baron to consider the welfare of the colony. Its laws were enacted by the Lords Proprietors with the advice and consent of the Assembly, but certain restrictions made them practically the will of the Lords.

There is no better way of understanding the County Palatine in America than to examine the same institution in England. To arrive at this we have made an analysis of the constitution of the County Palatine of Durham, which we shall give in our next section.

## SECTION II.—*The Palatinate Franchise.*<sup>1</sup>

William the Conqueror, in order to prevent the rearing of a powerful landed aristocracy, had recourse to two measures: (1) He took care not to grant to one nobleman large adjacent estates; and (2) he placed the administration of each shire in the hands of the sheriff, one of his own officers. There were, however, three exceptions. On the Scotch and Welsh borders and on the southeast coast, where an army from the Continent would be likely to land, he created large political divisions, and placed one man over each of them. Thus were created the Counties Palatine of Durham, Chester, and Kent. Over the first two, in order that no strong feudal families might be founded, he placed Bishops; but over Kent he thought he might venture to place a layman.<sup>2</sup> Of these counties, Durham was the most powerful; and because there was danger from the north long after the realm was safe from invasion from either west or southeast, Durham

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<sup>1</sup>In preparing this sketch we have used as a basis Robert Surtees's "History of the County of Durham." We have attempted to reproduce the general features of the Palatinate Franchise, and have not sought to fill in the more minute points which are not essential to our purpose, *i. e.*, to a concept of the general appearance of the Palatinate. The publications of the *Surtees Society* have also helped us considerably.

<sup>2</sup>Taswell-Langmead: *Const. Hist. of Eng.* (4th ed.), pp. 61, 62.

was still mighty at the period of the American colonization. Thus it happened that its franchise served as a model for some of the proprietary colonies in America.

The most striking characteristic of the Palatinate jurisdiction was its independence. The unique survival of the Anglo-Saxon earldom, it stood for that phase of English feudalism that most nearly approached the French dukedom. Until Henry VIII., exasperated at its loyalty to the Catholic cause, curtailed some of the feudal incidents of the Bishop,<sup>1</sup>—which, however, were later on mostly restored,—that dignitary was practically sovereign in his bishopric. *Quicquid Rex habet extra Episcopus habet intra* ran the maxim of Palatinate law.<sup>2</sup> At the head of the landed interest, the grantee from the king and the grantor to the county landowners, the Bishop exercised the feudal privileges of escheat, forfeiture, and wardship, and had the possession of mines, wastes, forests and chases. In civil and in military affairs he was supreme. The courts did not give the king's justice and did not punish breaches of the king's peace, but awarded the Bishop's justice and held to account violators of the Bishop's peace. Cases between his subjects were to be decided in the Bishop's courts. Cases between the Bishop and his subject could be appealed to the Court of the Exchequer, in London.<sup>3</sup> The Bishop had, also, admiralty jurisdiction of his coasts and navigable rivers, had his own money and his own mint, and had the authority to grant charters to cities.

When the king had business with the county, or with part of it, he must communicate with the Bishop. Still the royal authority was fully asserted over this dignitary.<sup>4</sup> In consequence of its extreme independence the county was not, until

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<sup>1</sup> Surtees: Hist. of Durham, Vol. I., Part I., p. lxix.

<sup>2</sup> *Ibid.*, Vol. I., Part I., p. xvi.

<sup>3</sup> In the 17th century a case between the Bishop and the City of Durham was decided in the King's Court of the Exchequer. Surtees: Hist. of Durham, Vol. IV., Part II., p. 159.

<sup>4</sup> *Ibid.*, Vol. I., Part I., p. cxxxiii.

1675, represented in the House of Commons. The Bishop, as a spiritual peer, sat in the House of Lords, and no doubt watched over the interests of the county in a general way.<sup>1</sup> Parliament fixed the amount of revenue that was expected from Durham. The Bishop and his officers determined how this was to be raised, and proceeded to collect it.<sup>2</sup>

The territorial division was primarily into four wards<sup>3</sup> and the city of Durham. The wards contained parishes and chapelries. A parish was divided into constabularies, and these in turn into manors, villages, etc.

The judicial system was of two ranks: the county courts, and the more strictly local tribunal. Of the former class were the regular English county courts of Law and Equity and of Gaol Delivery. The Justices for these were appointed by the Bishop, and had the numerous duties of the English Justices of the Peace of that time.<sup>4</sup> The courts of the second rank were the Halmote courts. These were the courts of the baronial hall, the "hall moots." Their business was to settle matters of customary tenure,<sup>5</sup> to make by-laws and injunctions, and to inflict penalties on guilty persons. They were held by the Steward, Bursar, or Terrar—or by any two of these—and always, as the records have it, "with others." It was these "others" that gave the Halmote court its popular feature. It made it the tribunal of the tenants of the estate, who composed the vill, and its judgment represented their

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<sup>1</sup> During the time of Cromwell, the Palatinate jurisdiction was suspended and the county was reorganized simply as a part of the realm. It was, therefore, allowed to send representatives to Parliament. These sat in two of Cromwell's Parliaments. The Restoration wiped this away. Cf. Surtees: *Hist. of Durham*, Vol. I., Part I., pp. cvi. and cxlvii.

<sup>2</sup> *Ibid.*, Vol. I., Part I., pp. cxlviii. and 'ix. The king's officers collected customs in the county.

<sup>3</sup> The ward was only an arrangement for grouping the parishes, and had no civil functions.

<sup>4</sup> Woodrow Wilson: *The State*, p. 413.

<sup>5</sup> "Durham Halmote Court Rolls" (*Surtees Society*, Vol. 82), Preface, pp. xiv.-xxxiii.

<sup>6</sup> *Ibid.*, p. xi. Later on these courts were held by the Seneschal. *Hist. of Durham*, Vol. I., Part I., p. cv.

opinion. Its mandates ran: "Injunctum est omnibus tenentibus villae," or "ordinatum est ex communi assensu."

The executive functions of the Palatinate government were in the hands of officers deriving their authority either directly or indirectly from the Bishop. Highest of all lay officers was the Chancellor of Temporalities. The ecclesiastical head, occupied—as was supposed—with religious affairs, entrusted secular business to his chancellor. That officer was the administrative head of the government. His it was to wield the Bishop's authority, albeit he was only an agent of his episcopal chief. Beside the high function of directing administration, he had what was then always considered the highest judicial jurisdiction; that is to say, he presided over the court of Chancery. It was by virtue of this function that he was at times spoken of as Vice-Chancellor.

The officer next in importance was the High Sheriff. He was appointed by the central authority, and at first had, doubtless, the large powers of the Norman sheriff; but by the seventeenth century his power had been lessened by depriving him of the duties of actively commanding the county militia, and of actually collecting the revenue.<sup>2</sup> At no time in the history of the Palatinate did he render his accounts in the Court of the Exchequer in London. He was responsible to the Bishop alone.

There was also a Receiver-General, whose functions were the receiving and the disbursing of funds. He received the rents from the *praepositi*, or bailiffs, and the other dues from the constables.<sup>3</sup> The greater part of the Bishop's revenue

<sup>1</sup> Durham Halmote Court Rolls, p. xxiv.

<sup>2</sup> These two duties had been given to the Lord Lieutenant and the Receiver-General. The former was first appointed in 1536, just after the Catholic uprisings, but the Sheriff continued to have nominal command.

<sup>3</sup> In Hatfield's Survey of Durham (Surtees Soc., Vol. 32) there is an account in full of the Receiver-General for 1384. One extract taken at random from this will show the exact fiscal relation: "Et de 77l. 16s. 9d. de exitibus et proficuis villae de Easington currentibus in onere prepositi *ibid.*, cum 50s. de perquisitis halmotorum *ibid.* Et de 54s. 4d. de aliis exit. et prof. ejusdem villae cum dominio non current. in onere prepositi, set constabularii." See p. 264.



came from rents for land. He also received, until 1660, a considerable sum from fines, forfeitures and other feudal incidents. Connected with the latter source of revenue was the Escheator, whose mere existence testifies how important was the feudal right of escheat.

The minor local officers were the coroner, the seneschal, and the bailiff. The seneschal was practically the old steward on the manor. We find him appointed to care for the towns, towers, castles or manors of the Bishop. The bailiff was the local agent of the Bishop. He looked after his master's interests in general, collected local rents or certain feudal privileges, and was charged with reporting to the regular sessions of the county courts the violations of Palatinate law within his bailiwick.<sup>1</sup>

In the County Palatine, as elsewhere in England, actual legislation came into existence slowly. The ancient customs of the people, evidenced by judicial decisions, were for a long time the chief source of law. This was especially true of Durham. Here the extraordinary privileges of the Palatine tended to retard law-making. There was no machinery for assembling the people to make their own laws. Whatever new measures of government the Bishop desired to introduce he had passed by his Council. This was an assemblage of the chief men of the county, and was, possibly, a formal survival of that council which, in Anglo-Saxon times, met with the Ealdorman to devise administrative measures for the county.<sup>2</sup> It was composed, as the records say, of certain enumerated higher officers and "other nobles"; presumably any nobles who chose to be present.<sup>3</sup> Public opinion was made manifest at the county courts. If the people demanded any measure, their desire found expression in the report of the grand jury, which brought the matter officially before the "sessions" of the Justices. The wise old Bishops were usually too much afraid of losing their influence over the

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<sup>1</sup> Hatfield's Survey, p. xiii.

<sup>2</sup> W. Wilson : *The State*, p. 410.

<sup>3</sup> Hatfield's Survey (*Surtees Soc.*, Vol. 32), p. xviii.

people to withstand rashly demands for reasonable reforms.<sup>1</sup> When the Bishop had decided to make a new law he published it through the courts.<sup>2</sup>

Of parish government in Durham county but little need be said. The parish existed by virtue of English custom, and was in Durham but little different from the same institution elsewhere in the realm.<sup>3</sup> We note, however, that here it seems more decidedly an ecclesiastical institution. By the seventeenth century the vestry had already become "select," and in some instances the vicar had the right to assent to elections.<sup>4</sup> At the middle of this century, the time that most concerns us, the civil functions of the parish were caring for the poor, maintaining the highways, assessing the parish rate, and a few other minor local duties. At times we find the churchwardens called before the assize to answer for the execution of certain laws that had been made by Parliament.<sup>5</sup> Here, as elsewhere in England, there were constables to the parishes. They collected the local tax and executed the decisions of the local courts.

We can now summarize the features of the Palatinate Franchise. The county was a constituent part of the government of England, subject in a general way to the larger gov-

<sup>1</sup> Hist. of Durham, Vol. I., Part I., p. cxlviii.

<sup>2</sup> The following will suffice to illustrate this: "It is orderit by the Justices of Peas wythin the bysshoppick of Duresme, by commandement of my Lord of Duresme in eschewyng of more bryne which gretly hurtyth the holl contre, as hereafter followythe, Fyrst, that no maner person ne person bryne ne more fro the 16th of March unto the fyrst day of October, accordyng to the lawe and custome of this realme of long time used."—Hatfield's Survey (Surtees Soc., Vol. 32), p. xiii. The memorandum goes on to say that if any one is suspected of burning a moor contrary to this ordinance, the township in which he resides must bring him before one of the Justices of the Peace, who shall condemn the culprit, if convicted, to imprisonment at the pleasure of the Bishop.

<sup>3</sup> For an account of the historical development of the English parish, see J. Toulmin Smith: *The Parish*; also Howard: *Local Constitutional History of U. S.*

<sup>4</sup> "Parish Books of Durham" (Surtees Soc., Vol. 84), pp. 2, 12, 26, 27.

<sup>5</sup> *Ibid.*, pp. 39, 67.

ernment, and in the actual administration of affairs it had a distinct machinery of its own. Within the county there were two forces: the Bishop and the people. The former was the chief source of authority. His rule was central and personal. He was the proprietary of the government. It was his agents that filled the offices. His exercise of power was restrained by public opinion, which was the only way of showing the popular will. His ordinarily beneficent rule and the possibility of changing a bad Bishop soon, if one were in office, brought about a quiet and substantial government. Upon the whole the system was benignly paternal, and when in use by a conservative population was capable of yielding, as a system, a considerable amount of success.

### SECTION III.—*The County Palatine in America.*

The Palatinate Franchise having proved to be a good form of government in England, and withal safe against a very strong development of popular liberty, the king and the Lords Proprietors considered it the best system for a colony planted so far away from royal oversight as America. Moreover, of all conceivable constitutions, it was most in accord with the king's idea of what the constitution of England should be. Charles II., in common with all the other Stuarts, would have made the realm one grand property whereof the king should have been Lord Proprietor.

Almost the first step of the Proprietors of Carolina showed that they, too, were in favor of the Palatinate system. They set about devising a scheme of government that contained all the characteristic features of the English County Palatine. This was the widely known Fundamental Constitutions.

These constitutions, although there is evidence that they were acceded to by the people of North Carolina,<sup>1</sup> were not as a whole put into force. Those features that it was thought possible to enforce with the conditions then existing in the

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<sup>1</sup> Col. Recs., III., p. 452.

colony were embodied in a temporary constitution, and that became the basis of the constitutional growth of the province. Speaking generally, all those provisions that related to the privileged classes and their position in society were held in abeyance; but there was no change in the spirit of the government. It was still strongly central and personal.

Examining the temporary constitution systematically, we are first attracted by the fact that the chief officer of the government bore the title of Palatine. This was undoubtedly in direct imitation of the County Palatine. Furthermore, the Governor of the colony was at times called "Vice-Palatine." The Proprietary was supreme. It had the veto power in legislation, and at first claimed the right of initiative. It appointed the chief officers, and its chief officers appointed the minor officers. There was also a High Sheriff, with lessened powers, similar to those of the sheriff of the county of Durham. There is the same Receiver-General of quit-rents, and the same local collectors, though not called bailiffs; the same system of land grants and quit-rents; and the same Escheator. To enable feudal land tenure to be perfect, as it was in Durham in its palmyest days,<sup>1</sup> the statute of *Quia emptores* was relented. There was, also, the same system of courts. (1) The General Court corresponded to the county court of the Palatinate, and was held by appointees of the Proprietors. It had the same jurisdiction and sat as Oyer and Terminer, Gaol Delivery, King's Bench, Common Pleas, and the Exchequer. (2) The local courts were the Precinct courts, which corresponded to the Durham Halmote courts, being held entirely under the control of the Proprietors and having the same local jurisdiction over the same tenants of the proprietors of the government. In addition, the Vice-Palatine, by a deputation of the high authority of the Palatine, exercised chancery jurisdiction in the colony, just as the Bishop's deputy exercised it in Durham.

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<sup>1</sup> The Proprietors had the right to their privileges, it will be remembered. "in as ample manner as any Bishop" of Durham. (Col. Recs., I., 103; also *supra*, p. 20.)

Still, there was a difference between the Palatinate in Durham and in North Carolina. In the former place, customs and traditional rights made it irregular in some of its details; it presented a broken surface. In America no custom or tradition was to prevent its uniform operation. The Lords thought that they had simply to devise a system and put it into the way to work of its own accord. In Durham, custom had preserved to the popular element of government some local functions; in North Carolina these did not appear. The proprietary scheme ruled them out. The royal grant had guaranteed to the people an assembly; but even this had been largely nullified by the Proprietors, who at first constituted their legislature so that for some time they remained chief wielders of its law-making power.

The parish did not come into North Carolina till the colony was fairly settled, and during the proprietary period it was not uniformly and fully established.<sup>1</sup> In those few parishes in which there were efforts to keep up the establishment, the civil functions were caring for the poor and assessing the local rate. Through an abundance of food in the colony, the former was not important, and the latter, being usually confined to expenditure for religious purposes, was but poorly paid by the Dissenters, and so it became but little more than a voluntary offering by the members of the Established Church. The other important function of the civil parish, the care of highways, was, long before the introduction of the parish, confided to officers appointed by the precinct court, and there it remained.

The "open vestry" was never known in Proprietary North Carolina. The affairs of the parish were in the hands of a "select vestry," which was created in the first instance by the Assembly, and was replenished by co-optation.

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<sup>1</sup> Col. Recs., III., pp. 48, 152, 153.

## CHAPTER III.

## THE PROPRIETORS AND THE CONSTITUTION.

SECTION I.—*The Legal Status of the Lords Proprietors.*

The powers conferred by the royal grant<sup>1</sup> on the eight "true and absolute Lords and Proprietors"<sup>2</sup> of Carolina may be classified as (1) legislative, (2) executive,<sup>3</sup> and (3) relating to land.

Taking up these in order, we find that in regard to legislation the Proprietors were given the right to make laws "by and with the advice, assent and approbation of the freemen of the said province." By this clause the Lords considered that they had the right of veto and initiative in legislation.<sup>4</sup> By another clause they must "from time to time assemble in such manner and form as to them shall seem best" the freemen or the delegates of the same. The Proprietors interpreted this as giving them the entire control of elections and of districts of representation, as well as of the time and place of meeting, and of the adjourning and the

<sup>1</sup> We have used for reference the grant of 1665, which does not materially differ from the first grant, that of 1663. Being the last, it was the one under which the Proprietors may be considered to have held. See Col. Recs., I., pp. 102-114.

<sup>2</sup> They were: Earl of Clarendon, Chancellor of England; Duke of Albemarle, Master of Horse; Earl of Craven; John, Lord Berkeley, King's Councillor; Lord Ashley, Chancellor of the Exchequer and later the Earl of Shaftesbury; Sir George Carteret, King's Councillor; Sir John Colleton; and Sir William Berkeley, then Governor of Virginia.

<sup>3</sup> At this time the modern classification of government functions into executive, judicial, and legislative had not come into existence. This distinction dates from Montesquien. Before him, the right of administering justice was considered a part of the king's executive function. For obvious reasons, we have followed the older method of classification.

<sup>4</sup> Lord Baltimore had these rights by the royal grant, but by wisely using the one and graciously foregoing the other he avoided any conflict with the settlers. See McMahon: Hist. of Maryland, I., p. 145.

proroguing of the Assembly. In the intervals between the meetings of the Assembly the Lords could make ordinances dealing with all ordinary matters, but not in any way impairing the rights of "freeholds, goods, or chattels." The power of making both laws and ordinances was limited by the requirement that all laws should be consonant to reason and as near as possible to the laws of England.

The executive powers were all that were necessary for the efficient management of internal affairs. Only in that they had not the actual sovereignty did the Proprietors lack full royal powers; and yet their authority was, for the purposes of their government, as ample as that of royalty. The charter, after conferring the general palatinate jurisdiction, went on to grant specifically the most important privileges embraced in that system. These were the civil functions of creating and filling offices; of incorporating towns, ports of entry, cities, etc.; of granting titles of honor, provided they were not the same as those used in England; of holding courts of justice and of punishing to the extent of life and limb; of pardoning offenses; of erecting counties and other local divisions; of creating baronies, with courts baron and leet, and with views of frank-pledge; of collecting customs duties when laid with the consent of the Assembly; and of having the advowsons of churches. They also had the military functions of making war against the Indians and other internal enemies, on land and on sea;<sup>1</sup> of raising and maintaining troops; of appointing officers for the militia; of fortifying their possessions; and of declaring martial law when they thought it necessary.

These extensive powers were rather vaguely limited by reminding the Proprietors that their privileges did not contravene their sovereign duties to the crown. There was, however, another limitation, which, though not expressly mentioned, was still a strong instrument in the hands of the

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<sup>1</sup>The right of making war on foreign enemies was withheld, because that would have implied sovereignty in the Proprietors, and it might have involved England in war.

people against too arbitrary a use of power by the Lords. This was the right on the part of the Assembly of consenting to money bills. It was but little advantage to the Proprietors that they could levy troops if the Assembly alone could pay them. This fact was of great influence in keeping the government weak, and, consequently, so timid that it soon lost the respect of the people. But in the case of the higher officers this restriction was almost neutralized by the fact that these officers received nearly all of their salaries from moneys taken in for quit-rents or from sales of lands. They were, consequently, not directly dependent on the will of the Assembly. Only in the case of fees, which were fixed by the Assembly, were they even indirectly dependent on the legislature.

In regard to land, the Lords were tenants-in-chief, holding "in free and common socage," but still "true and absolute" proprietors, "saving always their faith, allegiance and sovereign dominion due to us, our heirs and successors for the same"; *i. e.*, for the land. Besides one-fourth of all gold and silver ore that should be discovered, they were to pay "a yearly rent of twenty marks," receivable at the king's manor of East Greenwich in Kent. The land thus held could be granted to others in fee simple, fee tail, for life; lives, or years; to be held by such customs, rents, or services as the Proprietors chose to agree to. That the lesser grantee might know that his rights were safe, he was accorded the right of holding lands on the above-named terms. As a further security, the statute of *Quia emptores* (18 Edw. I.), by which subinfeudation had been forbidden in England, was made inoperative in North Carolina.

So far we have spoken of the Proprietors only; and it is with them that the grant was chiefly concerned. There was only slight mention of the rights of the people. There was enough, however, to guarantee to them the common rights of Englishmen; that is to say, the right of consenting to laws; of exporting and importing commodities on the same footing with Englishmen; and of not being tried for crime in



another colony than Carolina;<sup>1</sup> together with the English personal and property rights; liberty of conscience, although provision was made for church establishment; and the privileges of liege subjects of the English Crown. In order to encourage the planting of the colony, it was declared that certain specified articles, which it was thought were especially adapted to Carolina's soil and climate, should for seven years be admitted to England free of duty.

The grant conferred essentially the same privileges that Charles I. accorded to the Proprietor of Maryland. It may, therefore, seem strange that while in Maryland the proprietary rule was well received, being twice abolished and as many times reinstated to the great satisfaction of the people,<sup>2</sup> in North Carolina it produced strong opposition and real misery, its abrogation being hailed by the people with delight. The cause lies in the personal qualities of the two proprietaries. Lord Baltimore used his extraordinary powers wisely, justly, and honestly. He realized for the County Palatine, as applied to colonization, whatever advantages inhere in it as a system. In North Carolina the Proprietors, being eight in number, lacked unity of organization. They were, also, not informed as to the conditions of life in the colony, and they made such unhappy selections of agents that their government became a burden to the governed and a pest to the governors. These facts operated to make the proprietary system a failure in Carolina. The experience of these two colonies—Maryland and North Carolina—leads us to conclude that the chief fault of the absolute proprietary colony was that it made the destiny of the people too much dependent on the will of the Proprietary. Still, any fair mind must agree that the system admitted of excellent results in proper hands.

While on this point, we must say something of the circumstances under which the grant was made. One occasionally

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<sup>1</sup> They were still allowed an appeal to the king.

<sup>2</sup> McMahon: Hist. of Md., I., 141-2.

encounters the idea that the government must have been especially odious because it was given to eight of the "favorites" of Charles II. Now, there is a certain uncomplimentary sense in which this term is at times used, but there is no just reason for employing it here. If by "favorites" one means those whom the king called to help him in the affairs of state, there can be no objection to using the expression; for, of the eight, five occupied high offices at home, and one more was Governor of the most powerful English colony in America. It is fair to suppose that, as statesmen went in those days, the Proprietors were among the best. At a time when all England went wild with devotion to the restored Stuarts, nearly all of these eight men had the distinction of being among that small number whose loyalty was not an outgrowth of expediency, or of opposition to the arbitrary rule of Cromwell. They had, for the most part, been loyalists before the war, and many of them had lost property by their loyalty.<sup>1</sup>

That the good-natured king should have desired to reimburse these losses was more than natural—it was honorable. That he should have paid the obligation out of his American lands—that species of wealth of which he had the most—was unexceptionable. If, to our minds, it is an unwarrantable stretch of prerogative for the king to assume to provide, of himself, for the government of English citizens in America, it ought to be remembered that it was strictly within the custom of the time.

Whatever may have been the Crown's legal right in the first instance, there was in 1665 ample precedent for the king's power to dispose of the government of the Carolina colony. Judged by the standard of the times—something we should always remember in weighing historical actions—there was nothing improper about the transaction.

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<sup>1</sup> Clarendon, Colleton, Carteret, and John Berkeley had suffered with Charles II. Albemarle, formerly General Monk, had helped to reinstate him, and Wm. Berkeley had as Governor of Virginia kept the inhabitants of that province loyally affected to the Stuarts (Nar. and Crit. Hist., V., 286, note 2).

SECTION II.—*The Proprietors' Theory of Government—  
The Fundamental Constitutions.*

Having, as we hope, set the Proprietors in a just light, let us see how they acquitted themselves as governors. The most characteristic feature of the period is the confusion which grew out of the uncertain nature of the constitution. For the first fifty years of the life of the colony the inhabitants could not be sure that their government was stable. The Concessions of 1665 established one form of government, which, so far as the inhabitants were informed, was to be permanent. In 1670 the Fundamental Constitutions arrived. With them came a temporary constitution. The former was received by the Assembly,<sup>1</sup> and the latter was actually put into force. The existing system was reorganized in 1691. After 1670 the Lords sent three editions of the Constitutions to Carolina. These changes must have failed to give to the people that idea of permanency which is so necessary to any constitution. In 1680 Shaftesbury himself declared that there had never been any regularly organized government in the colony. Unquestionably the Proprietors were failures as rulers. It was only in 1715, when the Constitutions became as a system forever impossible, and when the Lords relaxed their right to prescribe government and allowed the people to frame their own code of laws, that anything like regularity and security from change came into the government of North Carolina.

From what has just been said it may be inferred that there were till 1715 two constitutions for the colony, the one theoretical and the other practical. We must now analyse these. The latter we reserve for another place, and the former we shall consider as regards both its elements and its relation to the constitution actually put into force. This is the more demanded because this system has rarely received just the

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<sup>1</sup> Col. Recs., III., 452.

treatment it deserves. It has been viewed, it seems to us, too much from the standpoint of nineteenth century democracy.

The conditions out of which the Fundamental Constitutions arose were peculiar. The moment during which they were conceived was a breathing-time just after two unsuccessful experiments with opposite radical ideas of government. English statesmen were pondering over their experiences, first under an absolute monarchy, and then under a government that grew out of a movement for an absolute democracy. The world has now come to think that Cromwell, with perhaps the best intentions, made as great a mistake as the Stuarts made. It also knows that the military despotism, by which the Protector found it necessary to support his authority, was not a necessary accompaniment of popular liberty. Englishmen of the time of which we are speaking understood the former fact but slightly and the latter not at all. To them each extreme seemed equally to be avoided. Accordingly, thoughtful people concluded that it was safest to trust the government to the middle class, the landed nobility. From this time, and in accordance with this idea, there arose the Whig party, which in a bloodless revolution overthrew the party of the royal prerogative, and established the principles of English liberty in the important Bill of Rights. It was through its influence, either in office or out, that the kingdom was brought to a condition in which self-government was possible.

It is a worthy tribute to Shaftesbury, who, whatever his later course, was at this time considered a well-intentioned man, that he foresaw, when Whiggery was a reality in the minds of but few, by what means the future was to be made safe. He, now that Clarendon had gone into voluntary exile on the Continent, was the most influential of the eight Proprietors. When an ideally perfect system of government was to be devised for the colony, he brought forward his views. Although Locke, the Philosopher, wrote the Constitutions, Shaftesbury inspired them. But the spirit in them

was an outgrowth of the time. The time was an unfortunate moment, when men had in their fright relapsed into the ideas of the fourteenth century.

Locke's share of the work, however, must not be ignored. He supplied the details for a plan whose general requirements were furnished him. The young philosopher was doubtless under the influence of recent experiences, and it was then a score of years before he, among the forces of the "Glorious Revolution," published his great works "On Civil Government" and "On Toleration." Still the spirit that produced "The Leviathan" was not all lost on the young Locke. Throughout the Constitutions we see the principle of civil liberty continually asserting itself. Wherever the feudal outline, the required part, ceases, liberal ideas appear.

In accordance with the idea of a landed aristocracy, the Fundamental Constitutions<sup>1</sup> divided society into seven ranks. At the top were the Proprietors, who were always to be eight in number, and each of whom should have a seignior, or twelve thousand acres of land, in each county. This gave the Proprietors one-fifth of the land in each county. One Proprietor, the Palatine, was at the head of the whole government. All the other Proprietors were associated with him so as to form the Palatine's court, the chief court of the province. All executive functions were grouped into seven classes, or offices, and a Proprietor was placed in each office. Thus there was a Chancellor, a Treasurer, a Steward, etc. Each of these officers, with six associates, formed a court with supreme jurisdiction of the function or functions for which that officer stood. All these courts were integrated into a Grand Council, over which the Palatine presided, and which had an *ad interim* ordinance-making power and the right of initiative in legislation.

There were two ranks of hereditary nobility, landgraves

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<sup>1</sup> We have used in this sketch the edition of 1669. It is the first authorized edition and is most easily accessible. See Col. Recs., I., 187-206. The Constitutions as amended in 1698 can be found in the Appendix to Vol. II. of the same series.

### 38 *Constitutional Beginnings of North Carolina.*

and caciques. There must be one of the former with four baronies<sup>1</sup> and two of the latter with two baronies each in every county. One man could have but one dignity. In case of failure of the heirs of one of these dignitaries, the Palatine's Court, or that failing, the Parliament was to fill the vacancy. The lord of each seigniority or barony had the right to hold courts leet. He could, also, grant two-thirds of his land to tenants for not more than three lives or twenty-one years; but the remaining one-third must be reserved for demesne.

Thus we see that the Proprietors and the hereditary nobility had two-fifths of the land of each county. The remainder was to be held by the freemen, in small holdings. It was divided into four precincts, each of which contained six colonies. It was held directly of the Proprietors, the holders paying annual quit-rents for it. If a man had from three to twelve thousand acres the Palatine's Court might erect his estate into a manor. The lord of a manor had the same privileges on his manor that a landgrave had on his baronies, but was not considered one of the hereditary nobility. To render this system permanent, primogeniture was recognized, and it was declared that these four kinds of estates should be indivisible, and, with the exception of manors, inalienable.

Below the four ranks already mentioned were the freemen. These were the smaller landowners. They made up the majority of the people, and, as a matter of fact, were the only persons mentioned in the Constitutions, except slaves, that settled in North Carolina. They were allowed to vote for delegates to the Parliament, and if they had a certain amount of land could hold most of the minor offices.

Proprietors, landgraves, caciques, and freemen—the last through their delegates—all met in a biennial Parliament. All ranks sat together in one body, but when a Proprietor protested against a proposed measure, the body resolved it-

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<sup>1</sup> 12,000 acres of land was a barony, a colony, or a seigniority.

self into four estates and repaired to different rooms to vote on the question at issue. If one chamber voted in the negative the bill was lost. All laws to be voted on must have been prepared in the Grand Council and when approved in the Parliament must be endorsed by the Palatine and three Proprietors, or they were not binding.

Below the freemen were the leetmen. These were tenants of the seigniories, baronies, or manors, and had certain legal rights against, as well as certain legal duties towards, their lord. On the marriage of a leetman or a leetwoman the lord was bound to give the newly married pair ten acres of land, for which not more than one-eighth of the yearly produce could be taken as rent. A leetman was under the legal jurisdiction of the lord's court, without appeal to a higher tribunal. Moreover, he was *adscriptus glebae*; that is to say, he could not change his habitation without his lord's written permission. Whoever voluntarily became a leetman was a leetman; and the rank once acquired was, like every other rank of the Constitutions, hereditary.<sup>1</sup>

The seventh and lowest rank was slavery. A master was given absolute authority over his negro slave, but he was not allowed to bind their souls; for, contrary to a later practice of a part of the slave-owners in North Carolina,<sup>2</sup> a slave was allowed the privilege of becoming a church member.

The provisions thus far recounted may be considered the necessary features of a landed-aristocratic government. Beyond these there were no very objectionable points. An adequate system of local courts was provided for the freemen. Trial by jury was guaranteed, but a verdict need not be unanimous. The English system of town government by

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<sup>1</sup> Bad as this institution was, it is doubtful if it was worse than the custom, then extensively practised in England, of kidnapping children and peasants for bonded servants in the American colonies. See Doyle: *English Colonies in America*, pp. 382-5.

<sup>2</sup> As late as 1709, James Adams, the missionary, testifies that some slave-owners would not allow their slaves to be baptized because they thought they would have no right to enslave Christians. Col. Recs., I., p. 720.

council, aldermen, and mayor was introduced. Jurymen, voters, and officeholders must have a specified amount of land. Two ideas seem to have been taken from the Romans: (1) like Justinian, the Proprietors declared that there should be no commentaries on their body of law;<sup>1</sup> and (2) by making it a base thing to plead for money, they seem to have desired to introduce the custom by which the Roman nobles pleaded the causes of their *clientes*.

The most strikingly liberal feature was the attitude towards religious belief. The Constitutions provided for perfect toleration of all churches. To give a church legal standing it must have at least seven members. These must believe in a God who was to be publicly worshiped, and must declare their method of testifying in a court of justice. It must be confessed that even in the present time of sects it would be difficult to call any body of people a church that could not come up to these requirements. The liberalness of this will be seen when it is remembered that it was devised at a time when the English Parliament was rushing into the passing of the iniquitous Test, Conventicle, and Five Mile Acts.

Another notably liberal feature was the provision for a biennial Parliament. In England the king and the dominant party were devising schemes by which they could rule without a Parliament; but the Proprietors guaranteed the Carolinians that they should have the right to elect, and to assemble, their Parliament every two years, whether or not an election were ordered or the Parliament formally summoned. If this arrangement were better than that of England, it far excelled that then in practice in the adjoining colony of Virginia, where the Assembly was not dissolved for eighteen years.<sup>2</sup> Moreover, there were no "pocket boroughs" in the colony, representation being fairly apportioned among the freemen.

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<sup>1</sup> Hadley : Introduction to Roman Law, p. 19.

<sup>2</sup> Bancroft : Hist. of the U. S., Vol. I., p. 50 (Ed. 1876).



To sum up, the Fundamental Constitutions were based on principles of like nature with those of the Whig party. They were feudal in their tendency, but guaranteed what were then considered the most important personal rights. Their reactionary features were hardly worse than their generation, and their liberal features were much better than the time. They were a system that the English people might well have had for themselves. Indeed, their appearance was hailed with marked approbation. On all sides people said that Locke's model was an ideal one. France and Germany at any time in the seventeenth or eighteenth centuries might well have considered them a boon. Almost any Continental nation of that day might advantageously have adopted them. It was not till the manifestation of that reform spirit which the American Revolution transmitted to the Old World that the constitutions of most European governments showed any striking improvement on the principles of the Fundamental Constitutions.

But if they would have done for the Old World they would not do for the New. The distinguishing principle of governmental policy developed in the period of our early history was a return to nature; not, as Rousseau thought, as nature was in some ill-defined, prehistoric time; but as nature then existed in the simple feelings and common sense of the people. The conditions of pioneer life made the existence of such an idea inevitable. In North Carolina it was universal, and where it held sway the system of Shaftesbury and Locke could never come into use.

Of this the Proprietors were half conscious. They sent along with the Fundamental Constitutions a temporary form which was partly an adaptation of the larger system. It did what the Governor was instructed to do; *i. e.*, it observed "what can at present be put into practice of our" Constitutions.<sup>1</sup> The original instrument was "received" by the people<sup>2</sup> in North Carolina and was afterwards pleaded as

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<sup>1</sup> Col. Recs., I., 181.

<sup>2</sup> *Ibid.*, III., 452.

## 42 *Constitutional Beginnings of North Carolina.*

the evidence of a compact between the people and the Proprietors. It never replaced the temporary form, but continued for some time a kind of constitution in remainder, awaiting the time when it might come into its rights. This time never came.<sup>1</sup> A more popular system took by prescription, and held by force, the authority of the government and its right was recognized in the Revisal of 1715.<sup>2</sup>

The effect of the Constitutions<sup>3</sup> was, speaking generally, negative. They prevented the development of a better form

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<sup>1</sup> It is likely that the Constitutions continued their anomalous existence till 1715. We have no evidence that before this date they were repealed, but they were gradually falling out of the minds of the Proprietors several years earlier. This is shown by the fact that they are continually mentioned in the commissions to the Governors till in Gov. Tyute's commission, 1708, all reference to them is omitted (Col. Recs., I., 695). They are last mentioned in a Governor's commission, so far as we know, in 1702 (*Ib.*, I., 555), when Johnson is told to come "as near as possible to the Fundamental Constitutions." In 1706, the South Carolinians, addressing the House of Lords, claimed the benefit of that clause in the Constitutions which provided for liberty of conscience (*Ib.*, I., 638-9).

<sup>2</sup> The Constitutions were first brought into Carolina in 1670 by Sayle (Hawks: Hist. of N. C., II., 463). It is difficult to say who was then Governor. At a meeting on Jan 20, 1670, the Palatine appointed Samuel Stephens (Col. Recs., I., 180); but in the instructions that accompany the Constitutions there is a blank land grant dated "— Jan., 1670," and in this, Peter Carteret is spoken of as Governor (*Ib.*, I., 183). These instructions were issued at the meeting at which Stephens was appointed, or at most not more than eleven days later. They could not have been issued earlier than the 20th, for on that day Berkeley was made Palatine and he is spoken of in the blank grant as such. The only reasonable conjecture that does not countenance an error in the instructions, is to suppose that Stephens was appointed but not yet sworn in, and that the old Governor, who seems to have been Carteret, was considered as still the incumbent. There are certain objections to this solution, as it will leave us under the necessity of believing that Stephens and Carteret each held the office for two distinct terms (cf. *Ib.*, I., p. xvi.).

<sup>3</sup> A recent writer goes so far as to say, "The Proprietors organized under the new system and sent directions to Governor Stephens to put it in force among the settlers on the Chowan" (Lodge: Eng. Colonies in America, p. 137). By the side of this let us place the real instructions. They run: "Not being able at present to put it fully into practice by reason of the want of landgraves and caciques and a sufficient number of people; however, intending to come as nigh as we can in the present state of affairs in all the colonies of our said province, you are required," etc. (Col. Recs., I., 181).

of government. Speaking more specifically, we may note two effects: (1) They precluded the introduction of local self-government, a fact which North Carolina had reason to regret during her whole colonial period; and (2) they produced confusion in the minds of the people and indirectly led to disregard for governors and government.<sup>1</sup>

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<sup>1</sup>There were five editions of the Constitutions: (1) the original draft, signed July 21, 1669; (2) that of March 1, 1670, a slight revisal; (3) that of January 12, 1682; (4) one issued at some unknown date between 1682 and 1698; and (5) that of 1698 (Hawks, II., 183-4, and Ramsay: Hist. of S. C., II., 123, *note*). The last was very much altered and contained but forty-one articles (see Col. Recs., II., appendix). In the minds of the North Carolinians there seem to have been but two sets, that of 1669 and that of 1698, both of which appear to have been received in North Carolina (Col. Recs., III., 452-3). The Lords themselves declared that the copy of 1682, the only one signed by all the Proprietors, was the only authentic edition (*Ib.*, I., 368). The Constitutions were translated into French in 1682, perhaps for the use of the French settlers, or for advertising purposes (*Ib.*, I., 344).

## CHAPTER IV.

## THE ANALYSIS OF THE CONSTITUTION.

The remainder of our task will be to trace the constitution as it actually was. This, in contradistinction to what we have just called the theoretical side of the Proprietors' government, may be termed the practical side. We shall take up its parts in the order of their dignity, beginning with the highest.

SECTION I.—*The Lords Proprietors.*

Prior to 1669 the Lords seem as a body to have had no executive organization. In October of that year<sup>1</sup> they met and organized under the new Constitutions. The six Lords then attending were elected to fill the positions of Palatine, High Constable, Chancellor, Chief Justice, Admiral, and High Steward.<sup>2</sup> There is no evidence that either of these offices, except that of the Palatine, ever meant more than a new title to the name of him that filled the office. Yet there was a show of keeping them up; and so closely were they clung to that in 1691, when the government was reorganized, they were included in the new plan.<sup>3</sup>

The Palatine, however, was an active factor in government, and was continued with unimpaired powers till the Proprietary period ceased. He, with the other Proprietors, constituted the Palatine's Court, the only one of the Proprietors' courts that was organized. His individual power was small; but his signature, three of his associates consenting, could effect almost anything. At one time he seems to have had

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<sup>1</sup> Col. Recs., I., 179.

<sup>2</sup> On account of the absence of Clarendon and Sir Wm. Berkeley from England, two offices were not filled. These were the positions of Treasurer and Chamberlain.

<sup>3</sup> *Ibid.*, I., 373.

the right to name the Governor.<sup>1</sup> It was necessary for the Palatine to be the oldest Proprietor, and this was regardless of great age or inferior capacity. By this means the Proprietors bound themselves almost surely to forego a choice of the best man, and made it extremely likely that the reins of government should always be in the hands of the veriest dotard of their number.<sup>2</sup>

SECTION II.—*The Governor.*

The determining of the policy of the government was in the hands of the Proprietors; but since they could not be on the spot themselves, each one appointed his agent or Deputy to represent him. As the Palatine was supreme among his associates, so his Deputy was supreme among the Deputies. This Deputy was the Governor, sometimes called the Deputy Palatine<sup>3</sup> and at others the Vice-Palatine.<sup>4</sup> The Fundamental Constitutions did not specifically recognize the office of Governor, the Palatine being there considered the head of affairs. The Governor was distinctively a feature of the makeshift constitution, and he was expected to give place to the Palatine in that day when the province should be perfectly organized under the scheme of Locke.

The Governor had for colonial purposes the general powers of the Palatine. He could exercise but few functions except with the consent of at least three of the Deputies. His chief power was his influence as titular head of the government and representative of the Proprietary authority. He was not fitted to have a conflict with the people or with any

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<sup>1</sup> See below, p. 47.

<sup>2</sup> The Constitutions provided that the eldest Proprietor in Carolina should be Palatine. Consequently when a Lord came into the colony, he could without a commission assume the duties of Vice-Palatine or Governor. This was recognized by the Lords in 1681, in the case of Sothel. They seem to have receded from this position in 1691 when they declared: "No Proprietor single by virtue of our patent hath any right to the government or to exercise any jurisdiction there unless empowered by the rest" (Col. Recs., I., 339 and 367).

<sup>3</sup> *Ibid.*, I., 180, 200.

<sup>4</sup> *Ibid.*, I., 345.

important branch of the administration, because when men ceased to be impressed by his dignity he was all but powerless. In such a case he was fortunate if he could prevent his enemies from securing his removal. If the Council should be opposed to him he could do but little. Through his conciliatory efforts, or through a unity of interests with the Proprietors, the Governor usually managed to steer clear of hostility from his brother Deputies, but he was not always so fortunate in reference to the representatives of the people.

The most important function left to the Governor independent of his Council was the right to concur in all measures, either of the Council or of the Assembly. Thus he was equal in power to each of these bodies. He also called, and presided over, the meetings of the Council. He was commander-in-chief of the colonial militia, and of his own authority appointed the subordinate officers. In 1697, when England determined to establish admiralty courts in the proprietary colonies, the Governor of North Carolina was made Vice-Admiral,<sup>1</sup> and from that time his official title was "Governor, Commander-in-Chief, and Vice-Admiral." He also, in the presence of the Council, administered to the higher officers of government<sup>2</sup> the oaths of fidelity and allegiance to the king and the Proprietors. He issued writs for the election of delegates, when directed to do so by the Proprietors or by the Council.<sup>3</sup> He had the execution of general orders, as enforcing the Navigation Act; received at times the probate of wills and granted letters of administration;<sup>4</sup> conducted business between the government and other colonies, calling on the Council at times for advice; and had the care of such minor matters as taking a census, measuring the water on the bars, and making a map of the country. At first, and for some time, he was directed to have

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<sup>1</sup> Col. Recs., I., 473.

<sup>2</sup> Col. Recs., I., 181.

<sup>3</sup> In the latter part of the Proprietors' rule the Assembly met of right biennially, and the writs were issued then at the decision of the Council.

<sup>4</sup> Laws of 1715, ch. 48.

passed in the Assembly certain laws that pleased the Proprietors.<sup>1</sup> For about forty years he sat as President of the General Court,<sup>2</sup> and had chancery jurisdiction. Convicted persons could be reprieved by him pending an appeal to the Proprietors.

The Governor was appointed by the Proprietors until 1691,<sup>3</sup> when he was supplanted by a Deputy Governor appointed by the Governor of Carolina, who, it was agreed, should be appointed by the Palatine.<sup>4</sup> The Deputy Governor could be removed by the Governor of Carolina either at the will of the latter or by the directions of the Proprietors.<sup>5</sup> The oldest Proprietor in North Carolina might take the office of Governor, being thought to have the right to supersede any Deputy. Such a Governor did not have to be approved by the king, as was necessary with any other kind of a Governor,<sup>6</sup> but still could be removed by the Proprietors.

At first no bond was required of the Governor, but when great complaint was made to the Crown in regard to illegal trade in North Carolina it was decided, in 1697, that the Deputy Governor should give bond for enforcing the Navigation acts. At first it was expected that the Lords themselves should give bond for their officer, but they protested that they ought not to be expected to do this, for the decision<sup>7</sup> "placed the approbation of their Governors in His

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<sup>1</sup> Col. Recs., I., 231.

<sup>2</sup> See below, p. 66.

<sup>3</sup> The instructions of 1665 gave larger powers to the Governor than were granted in and after 1670. In addition to the privileges just named, he could appoint his own Council, nominate the Secretary or Surveyor-General in case the Lords failed to select them, and preside in person, or by deputy, over the Assembly, which was then unicameral (Col. Recs., I., 79-92).

<sup>4</sup> Philip Ludwell, the first Governor of Carolina, was thus appointed (*Ib.*, I., 373). We have not seen the commission of Smith, his successor, but Archdale, who came next (1694), was appointed by all the Proprietors (*Ib.*, I., 389), and, so far as the records testify, so were his successors.

<sup>5</sup> The Governor of Carolina might be removed by the Palatine and three of the Proprietors, or by six of the Proprietors without the consent of the Palatine (*Ib.*, I., 374).

<sup>6</sup> *Ibid.*, I., 510.

<sup>7</sup> This decision was an Act of Parliament, whose direct jurisdiction extended in the colonies to matters of trade (*Ib.*, I., 476, 477).

Majesty." In the matter of trade, Parliament and the Crown were jealous of the powers of the Proprietors, and interfered to secure the proper collection of the customs. The king did not hesitate to instruct the Governor, through the Proprietors, by what means he was to execute these laws.<sup>1</sup> Edward Hyde, the first Governor of North Carolina after 1691, is the first whom we know to have given bond. The amount of the bond in other colonies was two thousand pounds, but because North Carolina's trade was inconsiderable, one thousand was thought sufficient for Hyde.<sup>2</sup>

Except in the case of Drummond, the first Governor, the tenure of office was during the pleasure of the Proprietors.<sup>3</sup> The salary was at first rather uncertain. Governor Drummond, the Proprietors suggested, might be paid with a monopoly of the fur trade, but there is no evidence that Berkeley put this idea into practice.<sup>4</sup> In 1669 the Assembly enacted that thirty pounds of tobacco should be paid by him who "was cast" in each suit before the Governor and Council. This was not a salary for the Governor, but simply the fees which the Governor and Council collected as officers of the court.<sup>5</sup> As early as 1686 the Governor of the southern colony was, we know, receiving two hundred pounds a year,<sup>6</sup> and it is therefore not likely that the Governor of Albemarle was

<sup>1</sup> Col. Recs., I., 492, 496.

<sup>2</sup> *Ibid.*, I., 773.

<sup>3</sup> Dr. Hawks (Vol. II., pp. 142-3) says the Governor was to "rule three years and then learn to obey." This is hardly correct. Berkeley was instructed to appoint a Governor for three years (Col. Recs., I., 52), and appointed Drummond, doubtless for three years. Yeamans, who was appointed Governor of Clarendon in 1665, was to hold "during pleasure" (*Ib.*, I., 95, 97). Samuel Stephens, Drummond's successor, appointed in 1667, held in the same manner (*Ib.*, I., 162), and so did all the other Governors whose commissions we have. Dr. Hawks's error was doubtless due to certain advertisements of the Clarendon colony, published in 1663 and in 1666, in which such a statement as he quotes was actually made (*Ib.*, I., pp. 43, 154, 157). This scheme to sell land could have no constitutional importance, for the Governor of Clarendon was in 1666 holding under a "during pleasure" commission. One cannot fail to notice also the bad policy in making a Governor rule first and then "learn to obey." In ordinary systems it is wise to make him "learn to obey" before he rules.

<sup>4</sup> Col. Recs., I., 52.

<sup>5</sup> *Ibid.*, I., 185.

<sup>6</sup> *Ibid.*, I., 391.



without any salary.<sup>1</sup> We arrive at definite information in 1711, when Edward Hyde's salary was two hundred pounds a year. Governor Eden's was three hundred pounds.<sup>2</sup> This seems to have been voted to each new incumbent for his term of office by the Council.<sup>3</sup> It was paid in quarterly payments out of the funds arising from the sale of lands and from the quit-rents.

If the office became vacant through the death or absence of the Governor, the oldest member called the Council together to elect a President of the Council, who administered the government until superseded by a Governor regularly appointed by the Proprietors.<sup>4</sup> The President received the salary that it was customary to pay to the Governor.<sup>5</sup> While the colony was under the direction of a Deputy Governor, Harvey, the incumbent, died. Henderson Walker, as President of the Council, succeeded him, and for five years guided the affairs of the province so much to the liking of the people that in 1706 the popular party induced the Proprietors to consent to having the government again under a President.<sup>6</sup> So much confusion arose from the attempt to enforce this concession that the Lords thought it advisable to return to the original method.<sup>7</sup>

When a newly appointed Governor arrived he presented his commission to the assembled Council, who published and recorded it. He then took the oaths of office and occupied his seat as presiding officer of the Council.<sup>8</sup> In the eyes of the Proprietors, considerable dignity was attached to this seat. Sir Peter Colleton, writing to the Governor in 1683, reminds him of his power in the Council and the Assembly, and says: "You ought to keep good order in the debates of

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<sup>1</sup> Edward Randolph said that in 1691 the Deputy Governor of North Carolina had no salary; but as Randolph mentions him as "one Jarvis," a name unknown in the records of the time, some doubt is thrown on the entire statement (Col. Recs., I., 467).

<sup>2</sup> *Ibid.*, II., 170.

<sup>3</sup> *Ibid.*, II., 450, 460.

<sup>4</sup> *Ibid.*, I., 790, and II., 460.

<sup>5</sup> *Ibid.*, II., 469.

<sup>6</sup> *Ibid.*, I., 709.

<sup>7</sup> *Ibid.*, I., 750.

<sup>8</sup> *Ibid.*, I., 841.

the Council when any one speaks he ought to do it with his hatt off and with the respect due to the place who are there a representative of the Palatine and by consequence the king from whence the Palatine's power is originally derived and it was in Culpepper's case, who made a disturbance in Albemarle in Carolina for which he was indicted of high treason at the King's Bench Barr declared to be treason for any man to take up arms against our government, it being levying warr against our king."<sup>1</sup> It must be confessed, however, that if Sir Peter's knowledge of Proprietary law was as limited as his knowledge of the art of writing clear English, his opinion is of but little value.

### SECTION III.—*The Council.*

In regard to membership, the history of the Council in Proprietary North Carolina divides itself into four periods. In the first there were six, eight, ten or twelve members who were selected by the Governor. This period ended with the temporary constitution of 1670, when the Council was made to consist of the five Deputies, who represented the colonial nobility, and five additional members elected by the Assembly. The latter represented the people. The third period began in 1691, when the Council was composed entirely of the Deputies. Finally, a last change was made in 1724,<sup>2</sup> when the Deputies were abolished and the membership was fixed at twelve, or less, all of whom were appointed by the Proprietors.

If the powers of the Governor independent of the Council were small, those of the Council independent of the Governor were still smaller. Its right to disagree with a proposition of the Governor seems to have been rarely exercised. As among the Proprietors there was a strong reluctance to merge the wishes of the individual Lords into the will of the

<sup>1</sup> Col. Recs., I., 345.

<sup>2</sup> *Ibid.*, II., 515. The Lords decided to introduce this feature in 1718 (*Ibid.*, II., 299).

Palatine, so there was among the Deputies a disposition for each to act, not for the colony, but for the interest of his chief.

The powers of the Governor and Council when acting together were, however, considerable. They varied with the changes in the constitution. During the first period, when the colony was small and the Assembly met annually, many matters could be carried to the legislature which would otherwise have gone before the Council. In the recess of the Assembly the Council<sup>1</sup> had most of the executive powers. It appointed the officers of all courts erected by the Assembly, and could suspend temporarily an officer appointed by the Proprietors. It could punish all officers, civil, religious or military, who violated their trusts. It issued and revoked commissions to military officers, granted reprieve, subject to the final action of the Lords, issued warrants for land grants, saw that settlers had the common personal and property rights of Englishmen, and did anything else that was not affixed to some other organ of government.<sup>2</sup>

In the second period the Council underwent a peculiar change. Two institutions now performed the functions of the older Council. These were the Council and the Deputy Palatine's Court. The membership of the former we have already stated; the latter was composed of the Governor and the five Deputies.<sup>3</sup> Both bodies were provided for in the Fundamental Constitutions, although they were now changed as to make-up.

The Council, or Grand Council, as it was at times called, was intended to be a semi-popular institution. It was a makeshift for the Grand Council of the Constitutions, and was endowed with all the powers of its model. It could decide disputes as to jurisdiction and procedure in the lower courts; declare war against the Indians, and make treaties of

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<sup>1</sup> After this when we use the term "Council" we mean, unless otherwise designated, the Governor and Council.

<sup>2</sup> See for this period, Col. Recs., I., 79-92.

<sup>3</sup> So far as we know there were no Deputies till 1670.

## 52 *Constitutional Beginnings of North Carolina.*

peace, alliance and commerce with the same; levy military forces; prepare all bills that were to come before the Assembly; decide matters relating to the Proprietors or to the Deputies; expend money voted for specific purposes by Parliament; and register the appointed Deputies.<sup>1</sup> On it was conferred as a temporary matter the authority to establish such courts as the Council "for the present time think fit for the administration of justice, till our Grand Model of Government can come to be put into execution."<sup>2</sup> To this was added the function of warrants for issuing land grants. Finally, the Governor was instructed to "governe" with the Council—whatever that term may have been held to mean.

One who reads casually the instructions to the Governors of this time will be apt to imagine that the Deputies acted only as a part of the Council. Such is not the case. They were authorized to represent the Palatine's Court of the Constitutions, and were thus empowered to convene the Assembly, to pardon offenses, to elect to offices in the Palatine's disposal, to erect ports of entry, to expend funds, except those granted by the Assembly for specific purposes, to negative acts of the Grand Council and of the Assembly, and to have all powers not otherwise granted which under the royal grant belonged to the Proprietors.<sup>3</sup> By the temporary arrangement they were given the power to consent to legislation.<sup>4</sup> Later on they had acquired the right to decide certain questions relating to land grants, as well as to adjourn, prorogue, or dissolve the Assembly.<sup>5</sup>

The latter of these two bodies was by nature the stronger. Apart from the fact that it represented the Proprietary interest, it actually controlled the Council; for, it will be remembered, the Deputies and the Governor constituted a majority in that body. That the stronger should have usurped the properties of the other, and the weaker should have become atrophied, is but natural. Accordingly, we find

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<sup>1</sup> Col. Recs., I., 196-7.

<sup>2</sup> *Ibid.*, I., 182.

<sup>3</sup> *Ibid.*, I., 193.

<sup>4</sup> *Ibid.*, I., 182.

<sup>5</sup> *Ibid.*, I., 239.

that in 1691 the Proprietors realized that the function of proposing laws was all that was left to the Council, and, since the people petitioned against the exercise of this function, they abolished the Grand Council altogether,<sup>1</sup> and reorganized their Deputies into what we have called the Council of the third period.<sup>2</sup>

By the beginning of the third period the usurpation of the Deputies became complete. What had been before a temporary Palatine's Court was now called a Council. In North Carolina, which was left to be reorganized as the Governor of Carolina saw fit, there seems to have been little change in the machinery of government. The change in the title of the Council came gradually. As late as December 9, 1696, the Council that met Archdale at the house of Francis Jones was called the Palatine's Court.<sup>3</sup> Owing to a dismal lack of documents on this period we do not know just when the change was completed. Judging from the powers held when we do get definite information, one would say that all the functions which were possessed by the two older bodies were given to the one new institution, except, of course, the preparing of laws.

In the fourth period there is no constitutional change except as to membership. In the latter half of the preceding, and in all of this, period the records of the Council are well preserved. From these we are struck with the large amount of judicial business done by the Council. It had much to do with lapsing the grants of, and issuing new patents for, land; and occasionally it probated wills. By this it will be seen that it was a regular court of record.<sup>4</sup>

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<sup>1</sup> Col. Recs., I., 381.

<sup>2</sup> It is improbable that either Council or temporary Palatine's Court exercised all the powers implied in constructing them like the two features of the Constitutions. The impossibility of introducing this instrument would prevent this: besides, the Proprietors, being supreme over both institutions, did not hesitate to take to themselves such business as they could handle better.

<sup>3</sup> Col. Recs., I., 472.

<sup>4</sup> For treatment of the Council as a court, see below, p. 71.

The most considerable of all its rights was the appointing of all those officers not named by the Proprietors. The effect of this was to place for a time the disposition of every higher office, except the delegates to the Assembly, in the hands of the central power.<sup>1</sup> The Council appointed the associate justices of the General Court, Justices of the Peace in the Precincts, the Sheriff, or Provost Marshal. In addition it could fill temporarily any vacancy that was, of right, in the hands of the Lords.

The Council sat as the Upper House of the Assembly. In this capacity its authority extended to any act of the Lower House, except to the passing of the budget, which seems to have been beyond their interference.<sup>2</sup> Now, as at other times, it was presided over by the Governor, who, however, had no vote in making a majority. All the members, including the Governor, received a salary equal to that of the members of the Lower House. For the time it was the Upper House; it had a Secretary—who was the regular Secretary of the Province and of the Council—a Doorkeeper, and a Messenger.<sup>3</sup> These officers were chosen by the Upper House, and corresponded to the officers of the other house. Each set, taken severally, received the same salary. When sitting as a Council merely it had a Messenger, who received an annual salary of twenty pounds.<sup>4</sup>

In 1722, on receiving directions from the Palatine, the Chief Justice of the colony was allowed by virtue of his office to sit as a Councillor, his rank being next to that of the head of the government.<sup>5</sup> In 1727 the Surveyor-General of His Majesty's Customs in America was also declared entitled to sit in the Council of any colony in which he might be.<sup>6</sup>

<sup>1</sup> Registrars of precinct courts were conditionally elective by the people.

<sup>2</sup> This assertion is based on the minutes of the Assembly. Here, while various other acts are sent to the Upper House for concurrence, no reference is made to such an action in regard to the money bill (Col. Recs., II., 675).

<sup>3</sup> Col. Recs., II., 623.

<sup>4</sup> *Ibid.*, II., 607.

<sup>5</sup> *Ibid.*, II., 460.

<sup>6</sup> *Ibid.*, II., 673.

The power of removing a Councillor was always in the hands of the Lords. If a Deputy should die or leave the province, the Governor and Council could appoint another to hold till the Proprietors named some one else. A Councillor thus appointed could perform all the duties of Deputies, except to vote for a man to fill a similar vacancy. One could do this only when confirmed under the seal of the said Lord.<sup>1</sup> Until 1718 the Councillors met at their own expense. In that year they agreed that for the future the necessary expenses of the meeting should be defrayed from the funds in the hands of the Receiver-General.<sup>2</sup>

SECTION IV.—*The Assembly.*

The General Assembly is the title by which the legislative body of North Carolina was usually known,<sup>3</sup> although at times we find the expression "Grand Assembly." It first convened in 1665,<sup>4</sup> but under what system we cannot say. We do know that the instructions sent to Sir William Berkeley, who was authorized to settle the government of Albemarle, empowered "the Governor and freemen, or the major part of them, the deputies or delegates, to make good and wholesome laws" for the colony. Later on instructions were sent directly to Drummond,<sup>5</sup> but they are not preserved. Under which of these the first Assembly met we do not know.

We come to firm ground with the Concessions of 1665.<sup>6</sup> It is from this point that our definite knowledge of the history of the Assembly begins. The Assembly, it was declared, should be unicameral, and composed of the Governor, the Council, and twelve delegates of the people. As soon as

<sup>1</sup> Col. Recs., I., 373.

<sup>2</sup> *Ibid.*, II., 323.

<sup>3</sup> *Ibid.*, I., 81.

<sup>4</sup> See Weeks: "William Drummond," *National Mag.*, Apr., '92. If, as was likely, Drummond's instructions (Col. Recs., I., 93) were similar to the Concessions of 1665, the Assembly must have met in, or soon after, January of this year; for by the Concessions the election of delegates was held January 1st.

<sup>5</sup> *Ibid.*, I., 93.

<sup>6</sup> *Ibid.*, I., 79.

the county could be divided into precincts, the inhabitants were to meet on the first day of each January to elect two<sup>1</sup> delegates from each precinct, a majority of these delegates being necessary to transact business. The Governor, or his Deputy, ought to preside, but if neither of these could be induced to be present the body could choose its own president.

Left as it was under Proprietary influence, the Lords seem to have thought it safe to confide to this body extensive powers. Accordingly, it had the right to appoint its own time of meeting; to adjourn from time to time, or from place to place; to make laws, provided they were not contrary to reason, to the interests of the Proprietors, or to anything otherwise stipulated in the Concessions, and provided they were as nearly as possible conformable to the laws of England; to establish courts of justice; to lay taxes on all property but the unsettled lands of the Proprietors; to erect baronies, manors, precincts, and other political divisions; to establish ports of entry; to provide military defense; to incorporate towns; to naturalize foreigners; on certain conditions to prescribe the quantity of land allotted and the manner of allotting it; to appoint such ministers of religion as should be provided for; and to determine its own quorum, provided it were not less than one-third of the whole. The laws when passed by the Assembly and signed by the Governor and three Deputies were published and, unless vetoed by the Proprietors, remained in force one and one-half years. If the Lords approved them they were in force till repealed, or till they expired by their own provisions.

The Concessions were copied and sent out in 1667 as Governor Stephens' instructions.<sup>2</sup> They remained in practice till 1670.

By the temporary constitution of 1670 Albemarle was divided into four precincts,—Chowan, Perquimans, Pasquo-

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<sup>1</sup> The Concessions omit the word "two," evidently by oversight; but the instructions to Governor Stephens (1667), otherwise exactly the same, supply it (Col. Recs., I., 167).

<sup>2</sup> *Ibid.*, I., 167.



tank, and Currituck,—each of which had five delegates in the Assembly. The twenty representatives and the five Deputies—who now for the first time appear—made up the Assembly. As soon as they met they elected a Speaker, and that being done, they chose the five persons who, with the Deputies, made the Council.

In the presence of such an effective engine of the Proprietary influence as the Deputies, it is but natural that the Assembly should have lost some of its former powers for the benefit of the new institution. The spirit of the new form of government was predominantly proprietary. The immediate effect on the Assembly was to make it but little more than a tool of the Proprietors. Its chief function was now legislative. The Governor, “by and with the consent of the Assembly,” made such laws as he saw fit. All laws must be signed by the Governor and three of the Deputies, after which they remained in force two years unless repealed by the Proprietors.<sup>1</sup> If, however, they were confirmed by the Lords they remained good laws until repealed by the Assembly or until they expired by limitation.

The Fundamental Constitutions<sup>1</sup> provided that the Assembly should meet biennially, and gave it the right to convene without the call of the Governor. The temporary constitution, however, simply directed each Governor in turn to call an Assembly “as soon as conveniently you can after the receipt of these instructions.” There is nothing further in the instructions, but we know that in the latter part of the century the Assemblies became almost regularly biennial, a circumstance which, though not evidenced by formal records, is well attested by numerous allusions in the correspondence of the time.

The changes of 1691 made actually apparent what had before been in the earlier stages of development; they completed the evolution of the Upper House. By the provision of the temporary constitutions of 1670 the Deputies and the

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<sup>1</sup> Col. Recs., I., 199, 201, §§71-80.

representatives had composed the Assembly; from which, as it seems, the Governor was excluded. This left the consent of the Governor and three Deputies to all laws an affair entirely out of the Assembly. From the custom of the Governor and Deputies meeting to consider the measures of the larger body grew the distinct organization of the Upper House. This growth was accompanied by the gradual dropping of Deputies from the Lower House, as we shall now venture to call it. This process was complete, and formally recognized by the Proprietors in 1691.

A few years later, in 1696, the region to the south of Albemarle was erected into Bath county and given two representatives in the Assembly.<sup>1</sup> Nine years later it was divided into three precincts, each of which was allowed two delegates.<sup>2</sup> In 1722 Bertie precinct in Albemarle was created and given two delegates. This made a membership of twenty-eight in the General Assembly, the highest point reached during the Proprietary period.

By the time of the Carey Rebellion, the Assembly had acquired considerable importance. It was no longer overshadowed by the Proprietary interests. Free from the restriction which came from giving the initiative in legislation to the Governor and Council,<sup>3</sup> it now began to develop in dignity and power, until it may be said to have been at length the chief factor in government. Through this process the Lower House gained the ascendancy, becoming practically the entire Assembly.<sup>4</sup>

This increased authority is shown by the part the Lower House took in the troubles arising from the Carey Rebellion. In 1708 Glover and Carey, the rival claimants to the governorship, agreed to refer their claims to this body for arbitration;<sup>5</sup> and in 1711, when it was necessary that some part of the government should be found strong enough to settle the

<sup>1</sup> Col. Recs., I., 472.

<sup>2</sup> *Ibid.*, I., 629.

<sup>3</sup> *Ibid.*, I., 381.

<sup>4</sup> From the Carey Rebellion to the close of the Proprietary period the Lower House seems to have had more power than it was allowed in the succeeding Royal period.

<sup>5</sup> Col. Recs., I., 697.

affairs of the colony, the Assembly came to the front as the regulating authority. Its exercise of power indicates its supremacy. It assumed to arrest Carey,<sup>1</sup> and dared to nullify all laws, judgments and other acts of government that had been made in the last two years, except marriages, probates of wills, letters of administration, sales and conveyances of lands when made between residents, provings of right to land, contracts and bargains.<sup>2</sup> Besides this, it attempted to regulate the future. It provided by act for the punishment of sedition, made regulations for qualifying officers, fixed the penalty for changing the oath of office, recognized the common law of England in North Carolina courts, adopted certain statutes of the British Parliament, settled the manner of filling vacancies in the places of Governor and of Lord's Deputy, and in the way of private bills provided for settling claims arising from alleged irregularities in Moseley's administration of the office of Surveyor-General. To this it added an address to the Lords, in which were stated calmly and intelligently the views of the Assembly on the existing condition of government. The people of North Carolina had spoken to the Proprietors before this, but usually to complain of grievances in the way of harsh laws or unscrupulous officers. Now they appeared in a constructive capacity. The Assembly passed from an almost continual opposition body to what we may call a body of friends to the administration. There was in this change a marked advantage to the colony. Aside from whatever sentiment we may have for Moseley and the "popular party," we cannot fail to notice that the triumph of Pollock and his friends brought with it the confidence of the Proprietors in the Assembly, and this, we know, led to many wise laws and withal to a long period of peace, prosperity and real constitutional growth. Neither Carey nor his followers could have brought about this result. The real interests of the colony both at home and abroad demanded a conservative policy. That is what the dominant party pursued.

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<sup>1</sup> Col. Recs., I., 780.

<sup>2</sup> *Ibid.*, I., 784-794.

The social condition of the people favored an extension of the authority of the Assembly. The Proprietors, the Governor and the people all wanted peace. It was necessary to have a power strong enough to assure it. The Assembly alone seemed adequate. The Proprietors' government was just at that time terrified before the Indian hostilities. The Lords were only too glad to find in the colony a force strong enough to bring harmony out of the existing discord.

The confidence of the Proprietors soon manifested itself in an important way. It had for some time been a real evil that the laws, never having been printed, were become so confused that, except by long and inconvenient searching of the records, it was impossible to know just what was law. As a relief for this the inhabitants asked that the laws might be codified. The Lords consented, and soon after the arrival of Governor Eden the Assembly took up the task of making what is known as the Revisal of 1715.

When the student of the constitutional history of North Carolina comes to this point he feels like expressing his relief in a long-drawn breath. He is on solid ground at last. The confusion which a dubious system and meager records have hitherto brought to him now gives place to certainty. He now has the outline of the government clearly set forth in well preserved records. After 1715 there is no need to complain of lack of materials.

The Assembly of 1715, the first called by Governor Eden, was harmoniously constituted. The outcome of its work was fifty-seven laws, either revisals of former enactments or entirely new measures.<sup>1</sup> Act fifty-seven "repeals all former laws not herein particularly excepted." The most important for us at present is the act relating to the election of members of the "biennial and other Assemblies."<sup>2</sup>

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<sup>1</sup> These laws are preserved in two excellent manuscripts in the State Library at Raleigh. Titles of the acts, with Burrington's comments, are given in Col. Recs., III., 180-189. The important acts of the code are given in full in *Ibid.*, II., pp. 206, 207, 213, 884, 885, 886, 888 and 889.

<sup>2</sup> *Ibid.*, III., 189.

<sup>3</sup> *Ibid.*, II., 213.

This act stipulated that the freemen of Albemarle county should elect five delegates from each precinct, and that those of Bath and other counties should have two for each precinct. They were to meet at certain specified places on the first Tuesday in November of alternate years and select their delegates from the freeholders. Foreigners, mulattoes, Indians, and minors were not allowed to vote, and one year's residence as a rate-payer was required of all others. The election was held by a marshal, or his deputy, who took the deposition of all whom he suspected of illegal voting. Each voter was required to bring his written ballot subscribed by himself. Returns of the election are not mentioned, but from a later source we learn that it was the custom to send them to the Governor and Council.<sup>1</sup> Each officer who had held an election was required to attend the Assembly during the first three days of the session, in order to be at hand to give evidence in contested election cases. The regular Assembly was biennial and met on the first Monday in November at the place of its last meeting—unless the Governor and Council twenty-one days beforehand designated another place. As regards calling, proroguing and dissolving the Assembly, the Lords and their agents were supreme.

If a representative-elect did not make his appearance by a time specified in the summons, he was fined twenty shillings for each day he was absent. The quorum of the Lower House, here called the House of Burgesses, was one-half of all the members elected; but if eight were met they had the right of adjourning from day to day until a quorum arrived. A bill, to become a law, must be signed by the Speaker in the presence of seven of his brother-members, as well as by the Governor and a majority of the Council. All special Assemblies were to be chosen as in the case of the regular Assemblies. This act, says Burrington in 1731, "was an old law taken from the Lords Proprietors' original constitutions, and hath undergone little alteration" in the revisal.

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<sup>1</sup> Col. Recs., II., 575.

<sup>2</sup> *Ibid.*, III., 180.

By this time a slight advance in its authority to repeal laws seems to have been made by the Assembly. In 1716 the Proprietors directed the Council and the Assembly to repeal a recent law by which North Carolina bills had been made payable for quit-rents.<sup>1</sup> Evidently the Lords had relinquished the right of repealing laws themselves, or considered it better policy to induce the Assembly to repeal them. The distinction was without a difference, however; for the Council gave the directions the force of law and instructed the Receiver-General to take only English money.

So far as the Assembly was concerned the administrations of Eden, Pollock, Reed, and Burrington (first term) were quiet enough; but it was otherwise with that of Sir Richard Everard. From the beginning there was a contest between him and the legislature.

In 1725, the first year of his administration, Everard, fearing to encounter the popular party, prorogued the Assembly before it had met. The Lower House refused to recognize the validity of such a prorogation, and assembling on the day originally set, proceeded to organize the House.<sup>2</sup> All they could do brought no recognition from the Governor, whose action they stigmatized as illegal. They declared that at their next meeting they would transact no business until their privileges had been confirmed by the Governor and Council, voted an address to the Proprietors, and then adjourned till the day for which they had already been prorogued. On reassembling, they declared that they did so according to adjournment, recognized the officers elected at the previous meeting, and in various other ways endeavored to establish the legality of their previous assembling.<sup>3</sup>

This Assembly (1726) is the first regular session of which we have the journal. It will be interesting to note here the formalities by which business was transacted. On the appointed day the members came together and received the election returns from the Provost-Marshal. Next, two

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<sup>1</sup> Col. Recs., II., 250.

<sup>2</sup> *Ibid.*, II., 575.

<sup>3</sup> *Ibid.*, II., 608.

members were sent to the Upper House to inform them that the Lower House was met and desired instructions for electing a Speaker.<sup>1</sup> In reply, the Upper House sent two members requiring the Lower House to attend to receive instructions. The inferior body then went *en masse* and were formally instructed to select their Speaker. They returned to their hall, elected their Speaker, informed the Upper House of the fact, and signified their readiness to present him. The superior body replied that they were ready to receive the person chosen, whereupon the Lower House attended the Upper House and formally presented their presiding officer. The Governor then addressed both Houses in a short and perfunctory speech, and the Speaker's official position was considered established.

On returning to their hall, the Upper House was informed that the Lower House was ready to receive the members of the Council who should be sent to witness the qualification of the representatives-elect. Accordingly, two Councillors were appointed for this duty.<sup>2</sup> The House itself, being thus legally convened, then swore in its own inferior officers,—the Clerk, the Doorkeeper, and the Messenger. It next resolved itself into a Committee of the Whole on Propositions and Grievances to prepare an answer to the Governor's speech. When ready, this answer was presented by the Speaker, who was accompanied by the whole House. In this session, when the Governor and Council decided to prorogue the Assembly, the Lower House was summoned and the Governor delivered the prorogation in person. The Lower House

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<sup>1</sup>It will be seen that the Lower House was in a dilemma. They had—and legally, as they claimed—elected Maurice Moore for Speaker. How could they now ask for instructions to elect a Speaker without acknowledging the illegality of that other election? Their solution of the problem was adroitly managed. Either advisedly or otherwise, Maurice Moore did not appear, and they immediately declared that his office was vacant, and then proceeded to elect another man for Speaker (Col. Recs., II., 608).

<sup>2</sup>Some of the Councillors, it was required, must witness the swearing-in of delegates, and if any delegate came late, other Councillors must be sent for before he could take the oath.

considered this illegal, and instructed the Speaker to pronounce the prorogation, which being done, they considered themselves legally adjourned.

From this Journal we gather some further particulars of the powers and constitution of the Lower House. It had the right to expel a member; to decide contested election cases involving membership in their body; to remit taxes; to send for persons, papers and records, with the object of redressing grievances; to appoint a Public Treasurer; and to pass money bills without the concurrence of the Upper House. Each member of each House received ten shillings for each day that attendance on the Assembly kept him from his home.

Each House had a Clerk,<sup>1</sup> whose duty was to keep the records and to issue warrants for commitment at the order of the House. His salary was, it seems, one pound a day.<sup>2</sup> For extra work he received extra pay. At this Assembly it was enacted that the Clerk should have two pounds for each warrant of commitment.

The Messenger's regular duties are not stated. He does not seem to have been the bearer of messages between the two Houses, for this duty was entrusted to members appointed for that purpose. We are told no more than that he executed the warrants of commitment, for doing which he received in each case one pound for each day during which he had the offender in custody. Besides these fees he had a regular salary, which was one-half as much as that of the Clerk, and which was just equal to that of the Doorkeeper.

We cannot close this sketch in a better manner than to relate an incident which very well illustrates the Assembly's

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<sup>1</sup>The Secretary of the province was regular Secretary of the Council and acted in the capacity of Clerk when the Council sat as the Upper House.

<sup>2</sup>At this Assembly he received twelve pounds as his regular salary. The delegates served for thirteen days, and it is probable that, inasmuch as the Clerk took office on the second day—being elected on the first—he served for twelve days. This would make his salary a pound a day. This, as well as other salaries, it must be remembered, was in colonial bills, which were then depreciated to one-fourth of their face value in English money.



jealousy of its privileges, its lack of the knowledge of its limitations, and its naïve candor in recognizing and correcting its mistakes. It seems that one John Richards had been imprisoned by the Provost-Marshall on the verbal order of Chief Justice Gale, although a *mittimus* was obtained the next day. The case being brought before the Lower House on petition from Richards, that body declared the commitment illegal and ordered the Provost-Marshall to relinquish the petitioner. Now, Richards, being no member of the House, this order was beyond the privileges of that body, as the members were made to see on the very next day. Instead of devising some ingenious bill which would cover its retreat from an untenable position, the House frankly acknowledged that it had no power to release from custody any one not its own member, repealed the previous order, and seemed to have thought its dignity none the worse for its mistake.

SECTION V.—*The Judicial System.*

The judicial system embraced the General Court, the Precinct Courts, the Court of Chancery, the Admiralty Court, and, in a manner, the Council.

*The General Court.*—Until the arrival of the temporary constitution of 1670 the only tribunal in the colony, so far as we know, was held by the Governor and Council. This is indicated by a law signed by the Lords Proprietors, January 20, 1670, which granted the "Governor and Council in time of court" thirty pounds of tobacco for each action, to be paid by "him that is cast." The Concessions of 1665 had granted to the Assembly the authority to create the courts that should be found necessary, but had left the appointment of judges and other officers to the Governor and Council.<sup>1</sup> In the sparsely settled territory of the infant colony one court seems to have been thought sufficient for all causes. It seems to have combined in itself the jurisdiction in law and in chancery as well as in criminal cases.

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<sup>1</sup>Col. Recs., I., 185.

<sup>2</sup>*Ibid.*, I., 82, 84.

The temporary constitution gave the power of establishing courts to the Governor and Council,<sup>1</sup> who, however, made no change in the court they had. The growth of the colony had necessitated the erection of Precincts, or districts of representation in the Assembly. It was consequently a part of the same process to make these Precincts the territorial bases of local courts. Here then was a differentiation. The older tribunal was now known as the General Court, and became the appellate court of the colony, the prototype of the present Supreme Court of the State.

This court was held by the Governor and the Deputies until near the end of the century. In 1685 the Proprietors concluded that it would be better to take the trial of causes out of the hands of these officers. Accordingly, the Governor was ordered to appoint four discreet men "to be Justices of the County Court of Albemarle." He was also to appoint a Sheriff,<sup>2</sup> who, with the justices, was to hold the General Court. The Governor and Council were to be a court to hear complaints against these new justices.<sup>3</sup> When in 1691 the Proprietors remodeled their form of government this new feature was incorporated into it<sup>4</sup> and continued there throughout the Proprietary period. Like many other orders of the Lords, this one was not put into execution until long after it was issued. As late as 1695 the General Court was held by the Governor and Deputies,<sup>5</sup> and it is only in 1702 that we know that the new system was in use.<sup>6</sup> The loss of court records between these two dates makes it impossible to say whether or not the change was earlier than the latter year. We only know that in this year Samuel Swann, William Glover, and John Hawkins, sitting by virtue of a *dedimus* from the President of the Council, held the General Court.<sup>7</sup>

<sup>1</sup>Col. Recs., I., 182.

<sup>2</sup>This use of the term "Sheriff" recalls the time when the English Sheriff was a judicial officer; here it simply meant chief judge, and had no administrative significance.

<sup>3</sup>Col. Recs., I., 351.

<sup>4</sup>*Ibid.*, I., 375.

<sup>5</sup>*Ibid.*, I., 442.

<sup>6</sup>*Ibid.*, I., 566.

<sup>7</sup>In 1694 and 1695 the Governor and Deputies sat with one or two "assistants." These were perhaps men who were better acquainted with the law of the colony than the former officers, and were chosen to advise on technical points. We hear nothing of them in this capacity after this date (cf. Col. Recs., I., pp. 405, 442).

The next step, and the last for us, was taken in 1713, when one of the Justices was made a Chief Justice, with a commission directly from the Proprietors.<sup>1</sup> Christopher Gale, one of the most remarkable of North Carolinians, became in that year the Chief Justice, although his commission did not arrive until one and a half years later. He was, it seems, the first to hold the office.<sup>2</sup> The number of his associates varied. In 1713 it was two, in 1716 ten,<sup>3</sup> in 1724 two,<sup>4</sup> and after other changes it became about eight.<sup>5</sup>

The Associate Justices were equal in authority with the Chief Justice.<sup>6</sup> In 1716 it took two Associates to transact business in the presence of the head of the court,<sup>7</sup> and in 1718 it was ordered that no court could be held without this dignitary, and that when all were present a majority was to decide.<sup>8</sup> The court met three times a year.<sup>9</sup> In the early part of that century it was allowable for a Justice to come down from the bench in order to represent a client before the court,<sup>10</sup> but in the Revisal of 1715 there is a law which forbids this, in either the General or the Precinct Court.<sup>11</sup>

The authority of the General Court was derived from two commissions. Under one it had the power of the courts of King's Bench, Common Pleas, and Exchequer: under the other it was a General Session of the Peace, and a Court of Oyer and Terminer, and Gaol Delivery.<sup>12</sup> The members of

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<sup>1</sup> Col. Recs., II., 80.

<sup>2</sup> Hawks (II., 139) gives Moseley as the first Chief Justice, holding from 1707-1711, but mentions no authority for the statement.

<sup>3</sup> Col. Recs., II., 264.    <sup>4</sup> *Ibid.*, II., 525, 551.    <sup>5</sup> *Ibid.*, II., 572.

<sup>6</sup> When the Royal Governor, Burrington, was disputing with the Assembly on this point, that body claimed that the powers of the Assistants were not equal to those of the Chief Justice. They based their claim entirely on a clause in the king's letter of instructions. It is evident that if they had known of a custom to support their side they would have mentioned it. The failure to do so is an indication of the absence of the custom (Col. Recs., III., 169-175).

<sup>7</sup> *Ibid.*, II., 264.

<sup>8</sup> Although this change was made in 1718 it does not seem to have reached the colony until 1724. *Ibid.*, II., 299, 525, 551.

<sup>9</sup> *Ibid.*, II., 265.    <sup>10</sup> *Ibid.*, I., 590, 592.    <sup>11</sup> *Ibid.*, III., 181.

<sup>12</sup> *Ibid.*, III., 150. These commissions seem at times to have been put into one, cf. *Ibid.*, II., 264.

the Council and other "principal officers" had general commissions of the peace.<sup>1</sup> This gave them the right to meet with the General Court when it sat by virtue of the latter commission; but the court records show that they very seldom availed themselves of this privilege.

From the General Court there was an appeal to the king. This, however, was of little consequence on account of a royal instruction of 1689, forbidding the Governors to allow appeals for cases involving a less sum than £500.<sup>2</sup> This, together with the inconvenience and expense of taking witnesses to England and the delay in the English courts, reduced appeal to a practical nullity. We have no record of an appeal during the Proprietary period.<sup>3</sup>

The General Court had certain non-judicial functions. It could regulate fares at ferries and appoint ferrymen,<sup>4</sup> direct the repairing of roads,<sup>5</sup> and by the direction of the Assembly it apportioned taxes and ordered the payment of the public indebtedness.<sup>6</sup>

The executive officer of the General Court was the Sheriff, or Provost-Marshal. These two terms are found side by side in the early history of the colony, but by the eighteenth century the latter is found exclusively as the official title, although "Sheriff" is still met in common use. The appointment to this office was made regularly by the Governor and Council. Both Albemarle and Bath counties had Provost-Marshals, although there was no General Court in the latter. In the closing years of their regime the Proprietors themselves appointed one Provost-Marshal for the whole colony.<sup>7</sup> This was of but little consequence, however, for Bath county, by an especial arrangement, was allowed to keep its distinct officer.<sup>8</sup>

Besides executing the orders of the General Court, the

<sup>1</sup> Col. Recs., II., 526, 556.

<sup>2</sup> *Ibid.*, II., p. 161.

<sup>3</sup> At one time the General Court decided that there was no right of appeal from its decisions to the king (Hawks, II., 207-9).

<sup>4</sup> Col. Recs., II., 475.

<sup>5</sup> *Ibid.*, II., 470.

<sup>6</sup> *Ibid.*, I., 429.

<sup>7</sup> *Ibid.*, II., 569.

<sup>8</sup> *Ibid.*, II., 606.

Provost-Marshall summoned juries, which were drawn after the English fashion;<sup>1</sup> appointed his deputies, who did for the Precinct Courts what he himself did for the central tribunal,<sup>2</sup> and at the direction of the Council notified the members, through his deputies, when a call had been issued for the convening of an Assembly.<sup>3</sup> He also, through his deputies, held the election for the members of the Assembly,<sup>4</sup> and executed the commands of the Council when it sat as a court.

The General Court also had a Clerk. His duties were merely those of a scribe. He was appointed by the Chief Justice,<sup>5</sup> and his remuneration was derived from fees.

The earliest Attorney-General of whom we have information was George Durant, who held the office in 1679.<sup>6</sup> The office continued until 1729, although we have but slight mention of it before 1713.<sup>7</sup> It seems to have been controlled by the Governor and Council under their general authority to appoint court officers.

*The Precinct Court.*—This court was held by several justices of the peace,—there was no fixed number,—who were appointed by the Governor and Council.<sup>8</sup> One of the number was the Chairman, or, as he was at times called, the Judge.<sup>9</sup> They held frequent courts, Perquimans having in 1703 seven in each year.<sup>10</sup> There being no court-houses in the colony, the court met until after 1722 at the residence of some conveniently situated planter.<sup>11</sup>

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<sup>1</sup> Col. Recs., I., 412.   <sup>2</sup> *Ibid.*, I., 791-2.   <sup>3</sup> *Ibid.*, II., 460 and 516-7.

<sup>4</sup> *Ibid.*, II., 214, 215.   <sup>5</sup> *Ibid.*, III., 201.   <sup>6</sup> *Ibid.*, I., 313.

<sup>7</sup> In 1696 Edmund Randolph said that there was no Attorney-General in North Carolina, but he seems to have referred to an officer of the Admiralty Court, the one that was afterward called the Advocate. At any rate we know that there was an Attorney-General in North Carolina in 1694, cf. *Ibid.*, I., 438.

<sup>8</sup> Dr. Hawks (vol. II., p. 194, but see *Ib.* 139) is inclined to think that in 1711 it was wholly inherent in the Governor to appoint the Justices of the Peace. But in 1703 the commissions for Perquimans Precinct were signed by the Governor and Council, and later on there is abundant evidence that this was the regular method (cf. Col. Recs., I., 574, and II., 526, 570).

<sup>9</sup> Col. Recs., I., 522, 531, and II., 725.

<sup>10</sup> *Ibid.*, I., 574, 575.

<sup>11</sup> *Ibid.*, III., 191.

The Precinct Court had jurisdiction over all civil suits under fifty pounds, and fulfilled the function of the English Orphans Court. It also had some non-judicial business. Owing to the late introduction of the parish, it received many of the duties which in England were in the hands of the vestry, and which in New England were left to the Selectmen. It was the unit of local government in North Carolina. It cared for highways, creating road districts and appointing overseers for them,<sup>1</sup> appointed constables,<sup>2</sup> granted franchises for building mills, gave permission to build bridges, and authorized the opening of new roads.<sup>3</sup> With the Clerk was recorded, in open court usually, the marks by which the settlers distinguished their cattle and hogs.<sup>4</sup>

The officers of the Precinct Court were the Marshal and the Clerk. The former executed the orders of the court and was the deputy of the Provost-Marshal. The duties of the latter were merely clerical, and he seems to have been appointed by the Secretary of the Province.<sup>5</sup>

*The Court of Chancery.*—When the Proprietors took the General Court out of the hands of the Governor and Council they did not carry with it the chancery jurisdiction which they had formerly lodged there. This court continued to be held by the Governor and Council till the end of the Proprietary period.<sup>6</sup>

*The Admiralty Court.*—This court was instituted to enforce the acts relating to trade. It was an extension of the English Admiralty Court, whose powers it had in local matters. Previous to 1698 all affairs that would rightly have come under its cognizance were by an act of 15 Charles II. left to the common law courts.<sup>7</sup> In this year, however, North Carolina was attached to Virginia for this purpose and one tribunal was made to serve the two provinces.<sup>8</sup> This ar-

<sup>1</sup>Col. Recs., I., 493. The General Court in a few instances are known to have appointed road overseers (cf. *Ib.*, II., 261).

<sup>2</sup>*Ibid.*, I., 486, 493.

<sup>3</sup>*Ibid.*, I., 531, 533.

<sup>4</sup>*Ibid.*, I., 388.

<sup>5</sup>*Ibid.*, I., 574.

<sup>6</sup>*Ibid.*, III., 150, 197.

*Ibid.*, I., 471-2.

<sup>8</sup>*Ibid.*, I., 490-1, 510.

rangement did not last long, and early in the succeeding century the colony had its own Admiralty Court.

The officers of this court were a Judge, a Register, a Marshal, and an Advocate. They were appointed by the Admiralty Court in England,<sup>1</sup> to whom they were obliged to report,<sup>2</sup> but vacancies were temporarily filled by the Governor and Council.<sup>3</sup>

*The Council as a Court.*—Besides being for a long time the General Court, and continuing to sit as the Court of Chancery, the Council had certain other judicial functions. Wills were proved before it,<sup>4</sup> and executors' accounts returned to it.<sup>5</sup> It could divide lands, and at times heard charges against citizens.<sup>6</sup> It tried officers for misconduct in office,<sup>7</sup> and we occasionally find it binding over to the General Court persons charged with ordinary offenses.<sup>8</sup>

#### SECTION VI.—*Finances.*

There were three sets of fiscal officers in North Carolina; (1) The Collectors of the Customs, (2) the Receiver-General and his deputies, and (3) the Public Treasurer. The first collected the import duties for the king. He was appointed by the Surveyor-General of His Majesty's Revenues in the Southern District<sup>9</sup> of America. The second collected the quit-rents, and was appointed by the Proprietors. The third received the taxes levied by the Assembly and collected, as it seems, by the Precinct Marshals.<sup>10</sup> He was elected by the

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<sup>1</sup> Col. Recs., I., 632.

<sup>2</sup> *Ibid.*, II., 762.

<sup>3</sup> *Ibid.*, I., 491, and II., 520, 765.

<sup>4</sup> Laws of 1715, Ch. 48.

<sup>5</sup> Col. Recs., II., 493-4.

<sup>6</sup> *Ibid.*, I., 376, 855.

<sup>7</sup> Cf. the trial of Tobias Knight. *Ib.*, II., 341-349.

<sup>8</sup> *Ibid.*, II., 56, 59.

<sup>9</sup> *Ibid.*, I., 842-3.

<sup>10</sup> There is mention in the records of 1713 and 1714 of a Precinct Treasurer (*Ib.*, II., 66, 124). This may have meant the Precinct Marshal or it may have indicated a distinct officer. There is not enough evidence, however, to warrant the statement that such an officer continued for any considerable time. While he did exist, he paid out moneys at the order of the Assembly and appeared in every sense a true treasurer. (See also *Ib.*, III., p. 151.)

Lower House of the Assembly and to that body was responsible. He was always looked upon as a most important bulwark of popular liberty. The office was doubtless of early origin, but it first comes into notice early in the eighteenth century.<sup>1</sup> All direct taxes of the colonial government were poll taxes, and were levied upon white adult males and colored adult males and females, bond and free.

#### SECTION VII.—*Miscellaneous Officers.*

*The Register.*—This officer was in existence in the colony from the first. One of the laws of 1715 (ch. 38) provided that he should be appointed by the Governor from three freeholders who should previously have been selected by the voters in the precinct; and this was doubtless the method from the first.<sup>2</sup> Thus there was a popular element in the selection of Registers. The duties of the Register were registering deeds, which were often for personalty, and were usually acknowledged in the precinct courts, and, until the appointment of parish clerks, the recording of births, marriages, and deaths.

*Constables.*—These were appointed by the Precinct Courts. To each was assigned a district, there being several in each precinct. Besides the usual duties of constables, they made lists of the tithables for the use of the vestry,<sup>3</sup> and summoned the coroner's jury. The slight mention of the office in the records would seem to indicate its small importance.

*The Coroner.*—The Concessions of 1665 provided for this officer. Then he was appointed by the Governor and Council, and a law, which Burrington pronounces an old one, in the Revisal of 1715,<sup>4</sup> shows that this method was retained throughout the Proprietary period.

<sup>1</sup> Col. Recs., III., 151.

<sup>2</sup> The Fundamental Constitutions provided that he should be appointed by the Chief Justice's Court from three men selected by the freeholders. As the Governor and Deputies held this court, it is likely that they took their idea from the Constitutions, and thus introduced the method which was embodied in the Revisal of 1715.

<sup>3</sup> *Ibid.*, I., 830.

<sup>4</sup> Laws of 1752, pp. 2, 3.



*The Secretary of the Colony.*—The Proprietors always appointed this officer, whose duties were chiefly clerical.

*The Naval Officer.*—This dignitary was appointed by the Governor at first<sup>1</sup> and later on by the Lords.<sup>2</sup> His duty was to “clear” vessels and to perform other similar functions at the ports. By 7 and 8 William III. he was required to give bond to the Collector of the Customs for the due performance of his duties.<sup>3</sup>

*Surveyors.*—Lands were laid out either by the Surveyor-General or his deputies, one of the latter being in each precinct. These were appointed primarily to survey public lands, at that time an important function. At first the Surveyor-General was appointed by the Proprietors,<sup>4</sup> and he appointed the Deputies,<sup>5</sup> but later on both were named by the Governor and Council.<sup>6</sup>

*The Escheator.*—The Proprietors’ right to tenure involved the right of escheat. Property escheated, as in England, for failure of heirs, and for conviction of felony. When lands were thought to be escheatable the Escheator, or his deputy, called a jury, who took evidence to find if there were any heirs.<sup>7</sup> No heirs appearing in the colony, it was held that there were none in existence. The Escheator seems to have been appointed by the Governor and Council.

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<sup>1</sup> Col. Recs., I., 492, 7.

<sup>2</sup> *Ibid.*, II., 497.

<sup>3</sup> *Ibid.*, I., 497.

<sup>4</sup> *Ibid.*, I., 73, 211.

<sup>5</sup> *Ibid.*, I., 728.

<sup>6</sup> *Ibid.*, I., 872.

<sup>7</sup> *Ibid.*, II., 305.



THE STRUGGLE OF PROTESTANT DISSENTERS  
FOR  
RELIGIOUS TOLERATION IN VIRGINIA



JOHNS HOPKINS UNIVERSITY STUDIES

IN

HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

IV

THE STRUGGLE OF PROTESTANT DISSENTERS

FOR

RELIGIOUS TOLERATION IN VIRGINIA

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## CONTENTS.

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	Page
INTRODUCTION . . . . .	7
I. THE ESTABLISHED CHURCH OF VIRGINIA . . . . .	8
II. THE QUAKERS . . . . .	19
III. THE HUGUENOTS AND THE GERMANS . . . . .	35
IV. THE PRESBYTERIANS . . . . .	40





## INTRODUCTION.

The history of Protestant Dissenters in Virginia may be divided into three periods:

I. The first period extends from the early years of the settlement of the colony to the year 1649. This is the period of the establishment of the Church of England as the Church of Virginia; of the conflict that arose between the Church of England party and the Puritan party in Virginia, answering to the struggle between King Charles and his Parliament in England; and of the consequent withdrawal of many of the Puritans from Virginia into Maryland.

The Church of England was for a time triumphant.

The Puritans in Virginia and Maryland have been made the subject of special study by Dr. Daniel R. Randall. His monograph, *A Puritan Colony in Maryland*, is published in the Johns Hopkins University Studies in Historical and Political Science for 1886.

II. The second period, beginning with the year 1649, extends to the close of the French and Indian War.

It embraces the rise of the Quakers, and later of the Presbyterians; and the efforts made by the Dissenters looking toward the recognition of their rights of toleration on the part of the government.

III. After the close of the French and Indian War came the struggle of the Separate Baptists, the Revolutionary War, and the final triumph of the Dissenters over the Established Church in the "Act for the Establishment of Religious Freedom" of 1786. This period may be called *The Period of Struggle for Religious Freedom*.

The present paper is confined to a treatment of the second of the three periods described,—*The Period of Struggle for Religious Toleration*.

## I.

## THE ESTABLISHED CHURCH OF VIRGINIA.

At the time of the first settlement of Virginia, that great movement known as the Protestant Reformation had not achieved its perfect work. Only the first steps had been taken toward the religious freedom that prevails to-day. For the authority of the Church of Rome there had been substituted the authority of various Reformed Churches in the several Protestant countries of Europe; but authority was still absolute. That form of belief adopted by each State as the national religion must be conformed to by each member of the State, or persecution would follow. Thus in Virginia, settled in the main by conforming Englishmen, not for religious reasons, but for the advancement of their temporal fortunes, naturally the Church of England was established by law.

In theory, the Church of Virginia was simply a branch of the Church of England—simply a part of a greater whole. But in respect to forms of worship, and more especially in respect to church government, it developed such important differences that in its actual working it fell far short of true Episcopacy.

The following description of the Church in Virginia is drawn in the main from the "Present State of Virginia," a work written in 1724 by the Reverend Hugh Jones. Other sources, however, have been drawn upon for occasional illustration and enlargement. The view is of the Church at the time of the administration of Sir Alexander Spotswood, Governor of Virginia from 1710 to 1722, by which time the peculiarities of the Church had about reached their full development.

The different stages of this development, so far as it was

under the control of the General Assembly of Virginia, may be seen in the various enactments of that body on religious questions.<sup>1</sup> These are extremely numerous, commencing with the earliest session of the Assembly, and continuing at intervals throughout the entire history of the colony. We are not, however, concerned with the individual statutes, but with the results of the whole body of legislation, modified as they were by the power of the royal governors, and by the rather nominal power of the Bishops of London, in whose diocese Virginia, as well as the other colonies, was embraced.

The Bishop of London was represented in Virginia by a commissary, whose authority was, however, very limited. The office had not been created till the year 1689, when the Rev. James Blair was appointed.<sup>2</sup> But by this time the Church of Virginia had reached such a stage of development independently of a commissary that where his power came into conflict with the established order of things it was practically null.

On the one hand, the commissary came into conflict with the Governor, who claimed to represent not only the king, but the Bishop of London also. In this contest the Governor, very naturally, proved the stronger. Nor, on the other hand, would the people submit to visitations. On this point Mr. Jones says: "Visitations have been in vain attempted; for the corrupt abuses and rigor of ecclesiastical courts have so terrified the people that they hate almost the very name, and seem more inclinable to be ruled by any other method, rather than the present spiritual courts."<sup>3</sup> The people were evidently afraid that visitations would lead to some worse form of ecclesiastical interference. Thus the commissaryship soon sank into insignificance. Its holder was hardly more than a confidential correspondent of the Bishop of London.

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<sup>1</sup> Cf. Hening's *Statutes at Large*, I., pp. 123, 144, 149, 155, 180, 240, 268-9, 433, 532, etc.

<sup>2</sup> Hawks. *Contributions to the Ecc. Hist. of the United States of America*, I., 73.

<sup>3</sup> *Present State of Virginia*, p. 66.

In a certain sense the Governor was the head of the Church of Virginia, but his headship rested upon two widely discordant theories,—the popular theory and the prerogative theory.

According to the first of these, the Governor had been made head of the Church by the law of 1643,<sup>1</sup> which was re-enacted, in effect, in 1662. This law provided: "That for the preservation of purity and unity of doctrine and discipline in the church, and the right administration of the sacraments, no minister be admitted to officiate in this country but such as shall produce to the Governor a testimonial that he hath received his ordination from some bishop in England, and shall then subscribe to be conformable to the orders and constitution of the Church of England, and the laws there established: upon which the Governor is hereby requested to induct the said minister into any parish that shall make presentation of him; and if any other person, pretending himself a minister, shall, contrary to this act, presume to teach or preach publicly or privately, the Governor and Council are hereby desired and empowered to suspend and silence the person so offending; and upon his obstinate persistence, to compel him to depart the country with the first convenience."<sup>2</sup> Under this law the vestries claimed the right of presentation, leaving to the Governor the right only of inducting the ministers who had been chosen by the vestries and presented for this ceremony.

But the Governors had a theory of their own. Taking high prerogative grounds, they claimed headship, and a more complete headship, by virtue of their commission from the crown. Their theory is clearly set forth in a letter written by Governor Spotswood in 1713 to the vestry of the Parish of

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<sup>1</sup> Beverley's *History of Virginia*, p. 212.

<sup>2</sup> Hawks, p. 53. Quoted from Trott's *Laws of the British Plantations*, p. 116. Hening (Vol. I., 277) does not give the full text of the law. He seems to have had in his possession only an abstract of it, which he construed so as to make the law inflict the penalty of expulsion on all Nonconformists, lay as well as clerical (I., p. xv.). In this error he has been followed by later historians. It seems clear that the law applied to ministers alone.

St. Anne in Essex county.<sup>1</sup> The following sentence occurs: "As the king is the sovereign of these plantations, so is he vested with the right of patronage of all ecclesiastical benefices, unless when it appears that he has by apt words granted the same away to private subjects." This right had at one time been "granted away" to Lords Arlington and Culpeper. In the grant by which they had been made proprietors of Virginia, it was expressly stated that they should be "sole and absolute patrons of all the churches and chapels . . . within the said territory." When this grant reverted to the crown, the right of patronage reverted with it; and this right had been "expressly excepted out of the Bishop of London's patent as Bishop of the Plantations." Governor Spotswood shows further that his commission and instructions from the crown expressly give him full power to collate to ecclesiastical benefice without consulting the vestries.

The English Attorney-general, Sir Edward Northey, had in 1703 given it as his opinion that "the right of presentation by the laws of Virginia was in the parishioners, and the right of lapse in the Governor." Spotswood's claim went, as we have seen, much beyond this. In practice, however, he did not go so far as the law of Virginia undoubtedly allowed, for he never ventured to make use even of this power to induct in case of a six months' vacancy.<sup>2</sup>

Briefly put, the question was whether or not the men who had established the living should be its patrons. The claim of the vestries was distinctly an American one, and its successful maintenance shows to what extent the theory and practice of the Church of Virginia had departed from strict Anglican views. The vestries remained the true source of power.

The power of the vestries was derived not alone from the laws of the colony, but even more largely from the peculiar constitution of Virginia society. The law of 1643, upon

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<sup>1</sup> Letter given in Meade's *Old Churches and Families of Virginia*, II., Appendix.

<sup>2</sup> Campbell's *History of Virginia*, p. 402.

<sup>3</sup> Meade, I., 162.

which the vestries based their claims to the right of presentation, has been given above. At the session of the General Assembly for 1661-62, the year after the restoration of Charles II., a thorough revision of the laws of the colony was made. Act II., of this session, embracing and enlarging statutes that had been before enacted, placed vestries on their final legal basis. It is in part as follows: "That for the making and proportioning the levies and assessments for building and repairing the churches and chapels, provisions for the poor, maintenance of the minister, and such other necessary duties for the more orderly managing all parochial affairs, Be it enacted, that twelve of the most able men of each parish be by the major part of the said parish chosen to be the vestrymen . . ."

Two churchwardens were to be chosen yearly out of this body by the vestry itself acting with the minister. A most important provision of the law was that the vestry itself should fill vacancies made in its own number by death or removal from the parish.<sup>1</sup>

By Act XIII.<sup>2</sup> of the same session churchwardens were required to make, twice a year, in the county courts, presentations of such misdemeanors as, in their own knowledge or by common fame, had been committed. These misdemeanors were swearing, abusing the Sabbath, contemning God's Word or sacraments, absence from church, drunkenness, fornication, adultery, slandering and backbiting. The churchwardens were, in a word, guardians of the morals of the people. They were, in addition, agents of the vestries in keeping the churches in repair and furnishing them suitably, and in collecting and paying the salaries of the ministers.

A course of action that added greatly to the power of vestries was the plan adopted by them almost invariably of employing a minister for only a year at a time, and failing to make presentation of him to the Governor for induction. Very few ministers were ever regularly inducted. The plan

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<sup>1</sup> Hening, II., 44.

<sup>2</sup> *Ibid.*, II., 52.

was adopted as a measure of self-defense. In the bad condition of the clergy prevailing at that time, it was sought to prevent unacceptable ministers from being saddled upon the parishes.<sup>1</sup> This dependence, however, of ministers for their positions upon the good will of the vestries was a feature in church government entirely at variance with the English system.

But the reason why the Governors of the colony were always careful to keep, as far possible, on good terms with the vestries, is not to be found in the legal powers of these bodies. It is to be sought, rather, in the respect that the Governors had for the influence of the individuals who composed the vestries. The vestrymen were the leading men of the community. In colonial days in Virginia it was considered an honor to hold office, and office-holding tended even to become the badge of a class. A member of the parish vestry was nearly always chosen to represent the county in the House of Burgesses. If not a vestryman, the member of the House was sure to be a representative of the same ruling class, and jealous of its privileges.<sup>2</sup> The Governors, then, in order to keep in favor with the House of Burgesses, were compelled to use great discretion in their dealings with the vestries.

In addition to this, the vestrymen had in some cases been educated in England, and had such business and social connections there that they knew how to make the force of their resentment against the Governors have weight with the English government. And it was the general policy of the English government to allow the people of the colony to have their own way where this did not affect seriously the amount

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<sup>1</sup> Meade, I., 150 ff.

<sup>2</sup> In order to see to what an extent the membership of the House of Burgesses was made up of vestrymen, it is only necessary to compare its lists of members given in Hening's Statutes, with the vestry rolls given in Meade's *Old Churches and Families of Virginia*. Bishop Meade makes the statement that there were not three members of the Virginia Convention of 1776 who were not vestrymen of the Established Church. This illustrates how the power of the colony was concentrated in the hands of a few men.

of revenue to be extracted from them. In no manner is this better illustrated than in the removal of Governors who made themselves obnoxious. Spotswood himself, the best of all the Governors, and a man whom the Virginians seem to have respected highly, incurred the enmity of some, and means were found to have him displaced.<sup>1</sup>

For the foregoing reasons the vestries were strong enough to make their claims good against the combined protests of the Governor, the commissary, and the clergy. As a result, the Church of Virginia, in the absence of central authority, was really a collection of independent congregations bound together rather in theory than in fact.

It was natural that from this state of affairs irregularities should arise in the church services, and it causes no surprise to find the following sentences in Jones's "Present State of Virginia": "In several respects the clergy are obliged to omit or alter some minute parts of the liturgy, and deviate from the strict discipline and ceremonies of the Church, to avoid giving offence, through custom, or else to prevent absurdities and inconsistencies. Thus surplices, disused there for a long time in most churches, by bad example, carelessness and indulgence, are now beginning to be brought in fashion, not without difficulty; and in some parishes where the people have been used to receive the communion in their seats (a custom introduced for opportunity for such as are inclined to Presbytery to receive the sacrament sitting), it is not an easy matter to bring them to the Lord's table decently upon their knees."<sup>2</sup> This passage casts a strong light upon the condition of affairs. It reveals the strength of local custom and the strength of partial nonconformity within the Church itself.

For an understanding of the influences which had brought about this diversity of local custom, a glance must be taken at the different elements that composed the population of Vir-

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<sup>1</sup> Campbell's History of Virginia, p. 404.

<sup>2</sup> Present State of Virginia, p. 69.



ginia. First, it should be remembered in this connection that up to the time of the Act of Uniformity of 1662, passed by the "Cavalier" Parliament of Charles II., the Church of England was not thoroughly an Episcopal Church, in that it did not in all cases require episcopal ordination of its ministers. The struggle between the Puritan<sup>1</sup> party and the Episcopal party had been going on largely within the Church itself, and with varying success. But by this act Presbyterian and other Puritan ministers were forced from the Church to the number of about two thousand. This was about one-fifth of the entire ministry of the Church at that time.<sup>2</sup> These facts warrant the statement that very many of the members of the English Church who settled in Virginia early in her history were probably tinged to a greater or less extent with Puritanism, in the broad sense of the term. These could not have failed to make their influence felt locally in church affairs.

The question of the strength of the more extreme Puritans (Independents) in Virginia is a much vexed one. Their number, however, must have been much greater than was formerly supposed. The Virginia Company of London was composed of some of the broadest-minded men of the age; and certainly after 1619 Sir Edwin Sandys and other leaders of the party that advocated popular rights as opposed to the royal prerogative, had a preponderating influence in its councils; so much so, that the company became, in the eyes of the king, "but the seminary to a seditious Parliament," and in 1624 its charter was revoked. Such a body of men would hardly have been very strict in requiring of applicants for patents conformity to the Church of England at a time when the most energetic means were being employed to find colonists. And, on the other hand, it is not reasonable to suppose that the settlers themselves, who, indeed, were by no means severely religious, would, in the midst of struggles

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<sup>1</sup> The term Puritan is intended to embrace all those who objected to bishops and the Book of Common Prayer.

<sup>2</sup> Green, *History of the English People*, III., 361.

against primitive nature and hostile savages, allow their theological antipathies to carry them into persecution. Papists, indeed, were excluded; for at that time it could not be understood how a Papist could be at heart a loyal Englishman, and the claims of Catholic Spain upon the territory of Virginia were not to be lost sight of. But there is good reason to believe that there were Independents in the colony as early as 1611. From time to time after that date small companies of them continued to come over from England. These settled principally in Nansemond county in the southeastern section of the colony. During the struggle between Charles I. and Parliament they were strong enough to excite the alarm of the government of Virginia. The Nansemond congregations, encouraged by the state of affairs in England, sent, in 1641, to New England for ministers. Three ministers answered the call. These were met by the law of 1643, requiring episcopal ordination of the clergy, and two of them were compelled to leave the colony.<sup>1</sup> However, the doctrines of Puritanism spread. Mr. Harrison, the Governor's chaplain, became a convert and went to preach to the people in Nansemond. Harrison reported afterward that several members of the Council and about one thousand among the people were inclined to Puritanism. To what extent, however, this number consisted of political Puritans is not indicated. Finally, the government adopted such measures toward the Nansemond Independents as were calculated to deprive them of their leaders and check their growing importance.<sup>2</sup> Under these circumstances many of them emi-

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<sup>1</sup> The fact that the third minister remained seems to indicate that he had received episcopal ordination and so could not be reached by the law.

<sup>2</sup> Though the removal of the Puritans to Maryland is mentioned by several contemporary writers, we have no knowledge of the exact course of events. It seems evident, however, that the confused account given of the affair by John Hammond in his "Leah and Rachel" cannot be accepted as accurate. It is impossible to believe that Governor Berkeley, stout-hearted royalist as he was, would have dared to expel from Virginia, as Hammond states, the representatives of a party which at that time was triumphant in

grated to Maryland, from the government of which colony their elder, Richard Bennett, had obtained for them substantial privileges. But many of them remained in Virginia. After the days of the Commonwealth, when the Church of Virginia became again an episcopal establishment, those of the Nansemond Independents who remained probably gave in a nominal conformity. But they must have been strong enough to affect the character of the parish or parishes in which they were located. Probable traces of their influence will be discussed further on in this paper.

In regard to the Puritans who came to Virginia in the time of the Commonwealth or after the Restoration of Charles II., there is no reliable information. Beverley says that some came, but that their number was small.<sup>1</sup> Beverley, however, was a strict Churchman and of Royalist parentage, and on this account he would be inclined to depreciate the influence of settlers of the party opposed to his own. It is probable, however, that those of the party who came to Virginia—certainly those who came after the Restoration—were

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England. Again, Hammond says that Colonel Samuel Mathews was the chief actor in the persecution of the Independents. This is the same Colonel Mathews who became in 1656 head of the Provisional Government of Virginia. Assuming that Hammond's account is correct, it would be almost impossible to explain the later influence of Colonel Mathews with the Puritan party in the day of their power. Also, the fact that Governor Berkeley remained in Virginia unmolested during the whole time of the ascendancy of the Puritan party seems to prove that his persecution of Independents could not have been extreme. It has been already shown that he had no warrant in law for severe measures against ordinary lay Nonconformists (p. 12, note). Hammond, it should be remembered, had been himself expelled from Virginia for turbulence in 1652 by the Provisional Government, and had taken up his residence in Maryland. There he had taken the side of Governor Stone in the dissensions stirred up by the Puritans who had come from Virginia, and he was compelled to leave that colony also. His hatred of the Puritans was intense. In writing his account of the Nansemond congregation it was undoubtedly his desire to make their conduct in turning against the government that had received them in their adversity, appear as monstrous as possible; and in order to bring into stronger relief the kindness that they experienced in Maryland he exaggerates the story of their hardships in Virginia.

<sup>1</sup> History of Virginia, p. 232.

political rather than religious Puritans; for men of the latter class would have preferred New England. Hence it may be concluded that those who came to Virginia had no scruples in giving their adhesion to the Established Church. But the influence of such men would naturally be in the direction of local freedom. There must be added to these the Scotch merchants, of Presbyterian education, who were always numerous in Virginia.<sup>1</sup> Another element of the population consisted of foreigners, that is, of men not from the British Islands. At a very early period there were in the colony a few Germans, Poles, French, and Dutch.<sup>2</sup> Later on came Walloons from time to time, and still later, Huguenots.<sup>3</sup> The combined influence of these various elements would seem to be enough to account for the irregularities in forms of service noticed by the Rev. Mr. Jones.

This view of the Church of Virginia will enable us to understand the attitude of the Church as a whole toward Dissenters, and the attitude of its local units. The independence of these units should be kept in mind. In it is to be found an explanation of the unequal manner in which laws against Dissenters were executed in different sections of the colony. Instances of this inequality will be given in the next chapter.

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<sup>1</sup> Campbell, *History of Virginia*, p. 448.

<sup>2</sup> *Narrative and Critical History of America*, III., 132. Neill, *Virginia Company of London*, pp. 227, 242, 285.

<sup>3</sup> *Huguenot Emigration to Virginia* (Virginia Historical Collection, V.), pp. v. ff. To the settlement of the Huguenots at Manakin Town and of the Germans at Germanna, a special chapter of this paper will be devoted.

## II.

## THE QUAKERS.

It is aimed in the present chapter and the following chapters to trace the conflicts that arose between the government of Virginia and the Protestant Dissenters who came into the colony after 1649, and to discover the causes which resulted in the final recognition of the rights of the latter. A detailed account of the Dissenters will not be presented. Their story has been told in various works with more or less minuteness. Only so much of it will be given here as is necessary to an understanding of underlying principles.

During the time of the Provisional Government in Virginia, church affairs were left to the management of the vestries, no change in service being insisted upon by the Parliamentary Commissioners except that, after one year from the signing of the Articles of Surrender, the Book of Common Prayer should not be used in public worship. This provision was made so as to bring the church into agreement with the church as it was at that time established in England.

About the year 1656 Quakers began to make their appearance in Virginia. Elizabeth Harris was their first missionary, and during her stay she seems to have met with some success in making converts.<sup>1</sup> Josiah Cole and Thomas

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<sup>1</sup> Janney, *History of the Religious Society of the Friends, etc.*, I., 430 ff. Janney says that one of the converts of Elizabeth Harris was Robert Clarkson, a respectable and influential colonist of Severn, where there was a Friends' meeting as early as 1657. He gives the location of Severn as between the Rappahannock and York rivers in Virginia. This is evidently an error. In a letter to Elizabeth Harris from Clarkson, dated from Severn, the 14th day of the eleventh month, 1657, the following passages occur: "The two messengers thou spoke of in thy letter are not yet come to this place; we heard of two come to Virginia in the fore part of

Thurston came over from England toward the close of the year 1657, and were probably imprisoned for a short time by the authorities. Thurston, it appears, suffered imprisonment again the following year.<sup>1</sup> William Robinson also was imprisoned this year.<sup>2</sup> There was at this time no special law in Virginia against Quakers, and these imprisonments were made in accordance with the general English practice. Under Cromwell's government, notwithstanding Cromwell's own principles of toleration, there was still great harshness shown to this sect in England.<sup>3</sup>

During the period of the Provisional Government in Virginia the Governors of the colony were elected by the Assembly. In March, 1660, two months before the return of Charles II. to England, Sir William Berkeley was elected Governor. This marks the return of the Royalist party to power in Virginia. One of the first acts of the Assembly, after the election of Berkeley, was directed against the Quakers.<sup>4</sup>

It provided that no master or commander of a ship should, under penalty of £100 sterling, bring any Quakers into Virginia; and that all Quakers were to be apprehended and committed to prison without "baile or mainprize" till they should give security to leave the colony. If any should dare to

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the winter, but we heard that they were soon put into prison and not suffered to pass; we heard further that they desired liberty to pass to this place, but it was denied them," etc. "We have disposed of most of the books which were sent, so that all parts are furnished, and every one that desires it may have benefit of them; at Herring Creek, Roade River, South River, all about Severn, the Broad Neck and thereabouts, the Seven Mountains, and Kent." The first of these passages strongly indicates that the writer of the letter was not in Virginia. The names mentioned in the second passage are conclusive of the point. They are all to be met with in the general vicinity of Annapolis, Maryland. The Kent spoken of is Kent Island, which was the territory in dispute between Lord Baltimore and Colonel William Claiborne. Severn, now appearing on the map as the name of the river on which Annapolis is situated, was at that time the name of a settlement made by the Puritans who had come from Virginia.

<sup>1</sup> Janney, I., 433.

<sup>2</sup> Neill, *Virginia Carolorum*, p. 285, note.

<sup>3</sup> Cf. Janney, Vol. I.

<sup>4</sup> Hening, I., 532.

return, he was to be proceeded against as a contemner of the "laws and magistracy and punished accordingly," and again banished. If any should return after this second expulsion, he was to be proceeded against as a felon.

No person, under like penalty of £100, should entertain any Quaker that had been "questioned by the Governor and Council," or permit Quaker assemblies in or near his house. Distribution of their literature was also forbidden.

There is no evidence that any Quaker ever suffered the extreme penalties of this harsh law. It is probable that the declaration issued by Charles II. from Breda had at least a temporary effect upon the authorities of Virginia.<sup>1</sup> The declaration embodied the principle that no man should be called in question for differences of religious opinion so long as he did not disturb the peace of the kingdom.

In 1662-1663, the laws of the colony underwent a thorough revision. The new statutes against Quakers and other Dissenters, though still severe, were noticeably less harsh than the old. In an act of 1662 providing against the profanation of the Sabbath by unnecessary work or by absence from church services, "Quakers and other recusants, who, out of nonconformity, totally absent themselves," are excepted from its general provisions and put into a special class. On these, for each month's absence a fine of £50 sterling was imposed. If absent a year, the offender was to give security for his good behavior, and also pay the fines for his monthly absences.<sup>2</sup> Next came an act of the same year imposing a fine of two thousand pounds of tobacco on any one who refused to have his child baptized.<sup>3</sup> In the following year (1663), the act headed "An act prohibiting the unlawful assembly of Quakers" was passed. Other Nonconformists, however, were included with the Quakers by the preamble of

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<sup>1</sup>The declaration was issued April 14, 1660. Information of it must have very soon reached Virginia. Probably toward the close of the year, it was sent officially to Governor Berkeley. (Cf. *Virginia Carolorum*, p. 283.)

<sup>2</sup>Hening, II., 48.

<sup>3</sup>*Ibid.*, II., 165.

this act; and from the preamble it may be seen also that the measure was in part political as well as religious.<sup>1</sup> The provisions of the act were:

1. Quakers of the age of sixteen years or over, assembling together to the number of five or more, were, for the first offense, to be fined two hundred pounds of tobacco; for the second, five hundred pounds of tobacco; and for the third, to suffer banishment.

2. If any one should be unable to pay the fine so imposed, it was to be collected from one of the wealthier Quakers at the meeting.

3. Masters of vessels who brought Quakers into the colony, unless by virtue of a recent act of Parliament, were to be fined five thousand pounds of tobacco and compelled to take them away on the return trip.

4. Persons entertaining Quakers in order for them to preach were to be fined five thousand pounds of tobacco for each offense.

5. Officers of the colony who neglected to carry out the provisions of the law should be fined two thousand pounds of tobacco.

6. It was provided, in conclusion, that Quakers or other Separatists, who gave security to attend no meeting in the future, were to be released from the penalties of the law.<sup>2</sup>

The number of Quakers who suffered under this law cannot be determined. The records of the courts have in most cases been lost, and Quaker accounts of the persecution necessarily rest under the suspicion of being exaggerated. Nor do these accounts always distinguish between maltreatment by the populace and punishment inflicted by the law.

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<sup>1</sup>The preamble is in part as follows: "Whereas it is evident of late time that certain persons, under the name of Quakers and other names of separation, have taken up and maintained sundry dangerous opinions and tenets; and whereas the said persons under pretense of religious worship, do often assemble themselves in great numbers in several parts of this colony, to the great endangering its public peace and safety, and to the terror of the people, by strict correspondence among themselves," etc.

<sup>2</sup>Hening, II., 180 ff.



The whipping of Mary Tompkins and Alice Ambrose, for instance, as described in Bishop's "New England Judged," if authentic, is to be explained probably as the work of a mob. There seems to have been no warrant in law for such a punishment.

In connection with the laws of the colony, there must be taken the instructions given by the crown to Sir William Berkeley on the 12th of September, 1662. With reference to religious differences, these instructions were:

"And because we are willing to give all possible encouragement to persons of different persuasions in matters of religion to transport themselves thither and their stocks, you are not to suffer any man to be molested, or disquieted in the exercise of his religion, so he be content with a quiet and peaceable enjoying it, not giving therein offence or scandal to the Government; but we oblige you in your own house and family to the profession of the Protestant religion, according as it is now established in our Kingdom of England, and the recommending it to all others under your government, as far as it may consist with the peace and quiet of our said Colony."

These instructions, which reveal the steady desire of the English government to foster the growth of the population of Virginia, could not have been entirely disregarded by Governor Berkeley. The growth of population, too, was greatly desired by the people. For this, and for other reasons which will be explained below, the people were not undivided in their support of persecuting measures against Quakers. The provision of the law that officers of the colony who neglected to carry out its requirements should be fined two thousand pounds of tobacco gives an intimation of the way in which it was, in some localities, soon to become almost a dead letter; for the execution of the law depended upon local feeling.

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<sup>1</sup> Account quoted in Neill's *Virginia Carolorum*, p. 299.

<sup>2</sup> Given in *Virginia Carolorum*, p. 292.

The House of Burgesses, however, in the session of 1663, set the example of proceeding against Quakers. John Porter, a member from the county of Lower Norfolk, having been accused of being well affected toward the Quakers, and so far "an ana-baptist as to be against the baptizing of children," was, upon his refusal to take the oaths of allegiance and supremacy, dismissed from the House. But it is to be inferred from the order of the House dismissing Porter that the action was taken owing to his refusal to take the oaths of allegiance and supremacy, rather than because of the charge made against him.<sup>1</sup> He does not appear to have been further prosecuted.

Before proceeding further with our account of the Quakers, it seems appropriate at this point to determine, if possible, what other dissenting sects were at that time represented in Virginia. The act mentioned above against those who refused to have their children baptized has led some to suppose that there were a few Baptists in the colony.<sup>2</sup>

The act, however, is not conclusive proof of this. The Quakers, in their general condemnation of all forms and ceremonies, included infant baptism. At a time when the memory of the excesses of the Anabaptists in Germany was still alive, this tenet would be particularly noticed, and stamped as dangerous. But it probably had not yet become known to the Assembly simply as one of the regular Quaker opinions; for it has been seen that John Porter was accused, not only of being well affected toward the Quakers, but also of being so far "an ana-baptist as to be against the baptizing of children." Thus a special act was aimed against persons holding this view.

In Beverley's "History of Virginia," the first edition of which appeared in 1705, an account is given of an obscure conspiracy formed in 1663 by certain servants and others to overturn the government. The ringleaders were "Oliverian "

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<sup>1</sup> Hening, II., 198.

<sup>2</sup> Cook's History of Virginia, p. 221. Neill, Virginia Carolorum, p. 293.

soldiers, who had been sent out to Virginia for misconduct at home; but the Dissenters were, according to Beverley, implicated. The plot was disclosed by Birkenhead, one of the conspirators, and came to naught. Birkenhead was rewarded by the General Assembly with his freedom and five thousand pounds of tobacco, and the 13th of September, the day on which the plot was to have been executed, was set apart for a yearly thanksgiving. This action of the Assembly is found recorded in the statutes of the colony.<sup>1</sup> But Beverley is our authority for the particulars of the plot. Beverley wrote forty years after the event described—ample time for the growth of tradition—and it is not certain that he used authentic records in preparing his account.<sup>2</sup> His point of view, too, was that of a Churchman disposed to believe all things discreditable to Dissenters. For these reasons his account of the affair is hardly to be fully accepted. The conspirators were probably of the convict class alone.

It is concluded from the considerations given above, and from the absence of definite statements in regard to them, that at this time there were, in addition to the Quakers, few, if any, Dissenters in the colony. The laws, however, were formed in a comprehensive manner to make provision against Dissenters in the colony at the time, and against any who might come in in the future.

From the few authentic sources of information that remain, it may be judged that the laws against the Quakers were unequally executed in different parts of the colony, but that in no section were they thoroughly put in force for any length of time.

The spirit displayed toward Quakers in some sections by leading men may be seen in the report of Colonel Edmund Scarborough, written in 1663, giving an account of the man-

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<sup>1</sup> Hening, II., 204.

<sup>2</sup> Beverley says that Birkenhead was given two hundred pounds sterling; Hening puts the reward at five thousand pounds of tobacco. It is not possible to say which is correct, for Hening gives only an abstract of the order of the House of Burgesses, and the accuracy of the abstract cannot, of course, be vouched for.

ner in which he had executed an order of the Assembly to collect rents and dues in the territory on the Eastern Shore which was at that time in dispute between Maryland and Virginia. Colonel Scarborough met with several of the sect in this region, and his epithets of contempt are unmeasured. To illustrate, one is called the "proteus of heresy, notorious for shifting schismatical pranks"; another is described as a "creeping Quaker"; a third, as a "prater of nonsense."<sup>1</sup>

The records of the county court of Accomac, among the very few court records of an early day that have been preserved, show that the first few Quakers who made their appearance in that county were charged with "vilifying the ministers, disobeying the laws, and blaspheming God." They were ordered to be sent to appear before the General Court. What further was done in the matter is not known.<sup>2</sup> Accomac, however, was not thus freed from Quakers, and it seems that as they became better understood they were allowed a greater degree of toleration. There were members of the society living in the county unmolested and respected between the years 1680 and 1690. The records say: "Thomas Brown and his wife, though Quakers, were yet of such known integrity that their affirmation was received instead of an oath."<sup>3</sup>

The experience of the Quakers in Accomac may probably be taken as typical of their experience in most of the other counties of the colony. After the first few years of ignorance on the part of the people at large in regard to the real tenets of the Quakers, and the first few years of turbulent and uninstructed zeal on the part of the first converts of the society, it is probable that they were not, as a general rule, further molested, beyond being made to pay tithes and an occasional fine for non-attendance at church.

Of the turbulence and ignorance of many of the early Quakers we may judge from the records of the county court

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<sup>1</sup> Given in *Virginia Carolorum*, p. 302.

<sup>2</sup> Meade, I., 427.

<sup>3</sup> Quoted in Meade, I., p. 255.

of Accomac above referred to, although, of course, allowance must be made for the source; and also from what might be naturally expected of members of a new sect in a new country. But the same thing may be inferred even from Quaker writings. Janney tells us that the Virginia Friends, led astray by John Perrot, were visited, and many of them reclaimed, by John Burnyeat in 1666.<sup>1</sup> But they seem to have relapsed, for William Edmundson reports in 1672 that "things are much out of order as regards church discipline." Church discipline was found to be greatly needed among them by George Fox also, in his visit in 1672. William Edmundson came to Virginia again in 1676, and on that visit, too, he found many "unruly spirits" among the Quakers there.<sup>2</sup>

It has been stated above that Sir William Berkeley would hardly have dared to disregard entirely his instructions from the crown in reference to the Dissenters. The several Quaker missionaries mentioned in the preceding paragraph do not appear to have been molested by him. William Edmundson, indeed, had an interview with the Governor in 1672 in regard to the sufferings of the Quakers. But in his journal Edmundson does not give illustrations of what these sufferings were, which, it seems reasonable to suppose, he would have done if they had been extreme. Edmundson himself, although he was treated with small courtesy by the Governor, was not interfered with in his work in the colony. We may conclude from this that the law of 1663 had by this time (1672) become practically almost inoperative, so far as its extreme provisions were concerned. This amelioration of the condition of the Quakers was accelerated by the coming of Lord Culpeper to Virginia as Governor in 1680. Lord Culpeper seems to have been much more inclined to carry out his instructions from the crown in regard to Dissenters than Sir William Berkeley had been. His instructions directed him "to permit a liberty of conscience to all other

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<sup>1</sup> *History of Friends*, etc., I., p. 103.

<sup>2</sup> *Ibid.*, I., 357.

persons, except Papists, so they be contented with a quiet peaceable enjoying of it, not giving offence or scandal to the government.”<sup>1</sup> He had accordingly, very soon after his arrival, stopped execution against John Pleasants, who had been indicted in Henrico county under the old laws.

But for a very long time after their first appearance in the colony the Quakers were numerically strong in only one section of Virginia. This was the southeastern section, the old stronghold of the Puritans. It seems that the Puritans remaining in Nansemond and adjacent counties were strong enough to determine the spirit in which the laws against the Quakers should be executed in that portion of the colony. They, no doubt, cherished a good deal of antagonism against Sir William Berkeley and his Royalist General Assembly, and would not be loath to show this feeling by obstructing the execution of laws of a special character. Their congregations, too, had been broken up, and, in preference to worshipping at the parish churches, many of them, no doubt, cast in their lot with the Quakers.<sup>2</sup> Thus the Quakers found in the southeastern section conditions more favorable for their protection and increase than they found in any other part of the colony.

In 1689 the famous Toleration Act was passed by the English Parliament as a reward to the Protestant Dissenters for the part taken by them in the Revolution of 1688. Persons taking the oaths of allegiance and supremacy, and subscribing a declaration against transubstantiation, were to be

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<sup>1</sup> Given in *Virginia Carolorum*, p. 396.

<sup>2</sup> It is known that Richard Bennett did this. Richard Bennett, former elder of the Nansemond congregation, one of the commissioners of the Parliament in 1652 for the reduction of Virginia, and first governor under the Provisional Government, continued to be a man of great influence even after the return of the Royalist party to power. In 1672, at the time of his conversion to Quaker principles, he was major-general of the forces of one of the military divisions into which the colony was divided. (See *Calendar of State Papers [English]—Colonial (1661-1668)*, p. 401.) It will be remembered that John Porter, the member expelled from the House in 1663, was from Lower Norfolk, one of the counties of the southeastern section.

allowed to worship in their own meeting-houses, provided these houses were legally registered. Dissenting ministers were to be licensed to preach and administer the sacraments in these meeting-houses, on condition that they took the oaths and signed the Thirty-nine Articles, with the exception of the 34th, 35th, 36th, and a part of the 20th. The Articles excepted are those which refer to the constitution, forms, ceremonies and claims of the National Church. For Baptists, further exception was made of article XXVII., which relates to infant baptism. Quakers were to be allowed to make declaration of fidelity toward the government, instead of taking the regular oaths; and to subscribe to the following declaration of faith: "I, A. B., profess faith in God the Father and in Jesus Christ his Eternal Son, the true God, and in the Holy Spirit, one God blessed forevermore; and do acknowledge the Holy Scripture of the Old and New Testament to be given by divine inspiration."<sup>1</sup>

The Toleration Act was incorporate by reference into the laws of Virginia in April, 1699. In an act for the suppression of various forms of evil, Protestant Dissenters are excepted from penalties incurred by failure to attend exercises of worship held at the regular parish churches. The exception is made in the following sentence: "Provided always, that if any person or persons dissenting from the Church of England, being every way qualified according to one act of Parliament made in the first year of the reign of our sovereign lord the King that now is, and the late Queen Mary of blessed memory, entitled an act for exempting their Majesties' Protestant subjects dissenting from the Church of England, from the penalties of certain laws, shall resort and meet at any congregation or place of religious worship permitted and allowed by the said act of Parliament, once in two months, that then the said penalties and forfeitures imposed by the act for neglecting or refusing to resort to their parish church or chapel as aforesaid, shall not be taken to extend to

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<sup>1</sup> Statutes at Large [English], V., 516.

such persons, anything in this act to the contrary notwithstanding.”<sup>1</sup> By Act XXXI. of the revised statutes promulgated by the General Assembly in 1705, the affirmation of Quakers was to be considered valid in the courts of law in place of the ordinary oath. This act was a recognition of the act of Parliament on the subject passed in 1696.<sup>2</sup>

In regard to the number of Dissenters in Virginia about the time of the recognition of the Toleration Act by the Assembly, we have the testimony of a writer whose name is not known, but whose account of the colony was written between 1696 and 1698.<sup>3</sup> He says: “There are few or no Dissenters in that country; not so many of any sort as to set up a meeting-house, except three or four meetings of Quakers, and one of Presbyterians.” The situations of these meetings are not given, but it is almost certain that they were all, with the probable exception of one Quaker meeting in Henrico county,<sup>4</sup> in the southeastern section of the colony. The Presbyterian meeting-house here referred to was probably the first set up in Virginia; for though the Rev. Francis Doughty,<sup>5</sup> a Presbyterian minister who labored among the Puritans in Maryland for some years (beginning, probably, with the year 1657), preached occasionally in Virginia also, he did not gather together a congregation there. The Presbyterians of the quotation given above were located on the Elizabeth River, and were probably emigrants from the north of Ireland. The first reference to them that we have is made in a letter written July 22, 1684, by the Rev. Francis Makemie to Increase Mather. Makemie says of them that they had

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<sup>1</sup> Hening, III., 168 ff.

<sup>2</sup> Hening, III., 298. The reference in this act to Roman Catholics illustrates the feeling of the time toward that class. It is provided that “Papist recusants, convicts, negroes, mulattoes, and Indian servants, and others not being Christians, shall be deemed and taken to be persons incapable in law to be witnesses in any case whatsoever.”

<sup>3</sup> Massachusetts Hist. Soc. Coll., 1st Series, V., 124, note.

<sup>4</sup> Nar. and Crit. Hist. of America, III., 166.

<sup>5</sup> Briggs, American Presbyterianism, pp. 101. 111.



lost their Irish minister by death in the August previous.<sup>1</sup> Makemie remained among them for some time, and was succeeded by the Rev. Josias Mackie,<sup>2</sup> who continued to be their minister till his death in 1716.

On the 22d of June, 1692, Mackie fulfilled all the conditions of the Toleration Act and was formally given permission by the county court of Norfolk county to preach at certain registered places.<sup>3</sup> Mackie was probably the first Dissenting minister who thus qualified himself to preach in Virginia. Francis Makemie, who came to America as early as 1683, did not become permanently settled for some years, but worked as a missionary in Maryland, Virginia, and the Barbadoes. It is not necessary for us to follow him in his wanderings. It is sufficient for our present purpose to know that he obtained, October 15, 1699, from the county court of Accomac, formal license under the Toleration Act to preach at certain specified places in that county; that he was one of the ministers who united in 1705 or 1706 to form the Presbytery of Philadelphia; and that, after a life of much usefulness, he died in 1708.<sup>4</sup> At his death the congregation collected by him in Virginia ceased to exist. The Elizabeth River congregation seems to have practically disbanded even before the death of

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<sup>1</sup> Briggs, *American Presbyterianism*, Appendix, p. xlv.

<sup>2</sup> Sprague, *Annals*, III., 6 ff.

<sup>3</sup> The oaths and declarations made by him are given in Sprague's *Annals*, III., 6 ff.

<sup>4</sup> Mr. Justin Winsor, in the *Narrative and Critical History of America*, vol. V., chap. IV., has fallen into a curious error in regard to the early Presbyterians of Virginia. and Makemie's connection with them. He says (p. 267): "The Governor [Gooch] proved conciliatory and became a favorite of the people. He granted toleration to the Presbyterians, who were now increasing on the frontier, where Makemie and the Scotch-Irish were beginning to gain influence, and the sturdy pioneers were thinking of the country beyond the mountains." Again: "The dissenting element was chiefly among the Presbyterians, and their strongholds were away from the tidewater among the mountains. The Reverend Francis Makemie was the principal leader among them," etc. (p. 282). The main facts in reference to Makemie have been given above. Makemie lived on the Eastern Shore of Virginia, was licensed to preach in 1699, and died in 1708. The Presbyterians of the mountains did not begin to come into the colony until 1732.

Josias Mackie in 1716, for in the second edition of Beverley's "History and Present State of Virginia," which was prepared for publication before Beverley's death in 1716, the following reference is made to the Dissenters: "Yet liberty of conscience is given to all other congregations pretending to Christianity on condition they submit to all parish duties. They have but one set conventicle among them, viz., a meeting of Quakers in Nansemond, others that have lately been being now extinct; and 'tis observed by letting them alone they increase daily." It is possible that "the melancholy circumstances"<sup>2</sup> of Mr. Mackie, noticed by the Presbytery of Philadelphia in 1712, had reference to some condition of Mr. Mackie's health that destroyed his activity and usefulness as a minister.

It will be seen from the above that the recognition of the principle of toleration at that time in Virginia had no great immediate effect in increasing the number of Dissenting congregations. On the contrary, after a few years, their number seems rather to have diminished.

In 1711, the Quakers of Virginia came into conflict with Governor Spotswood in regard to military service. At that time there was an alarm of an intended French invasion, and Spotswood endeavored to put the colony into a position of defense. In a letter to Lord Dartmouth he describes the attitude of the Quakers. Their "doctrines are such as cannot be suffered in any government." "They have," he says, "not only refused to work themselves, or suffer any of their servants to be employed in the fortifications, but affirm that their consciences will not permit them to contribute in any manner or way to the defense of the country, even so much as trusting the government for provision to support them that do work; though at the same time they say that, being obliged by their religion to feed their enemies, if the French should come here and want provisions, they must, in con-

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<sup>1</sup> Hist. and Present State of Virginia (Campbell's Ed.), p. 228.

<sup>2</sup> Sprague, *Annals*, III., 5.

science, supply them." Spotswood had, as commander-in-chief of the forces of the colony, and thus empowered to demand services of all in time of emergency, put the laws in force against them; "since," as he very justly observes, "any one that is lazy or cowardly would make use of the pretense of conscience to excuse himself from working or fighting when there is great need of his services." However, the French scare soon passed over, and with it, probably, the conflict which it had occasioned.

According to Beverley, as has been noticed above, the Quakers had about the year 1716 but one meeting in Virginia. They, however, soon after this became more flourishing, as is shown by their own records and by a letter from the Rev. Mr. Forbes, minister in the upper parish of Isle of Wight county, to the Bishop of London. In the year 1727, Samuel Bownas, a missionary of the Quakers, came to Virginia on a second visit. His first visit had been made twenty-two years before. He states in his journal that in this time nine public meeting-houses had been built.<sup>2</sup> The letter of the Rev. Mr. Forbes, sent in 1724, corroborates in a general way this statement, and gives reasons for the increase. It says: "In Nansemond, a large, populous and wealthy county, the Quakers do sensibly increase, not only in offspring, but also proselytes; and so many are the offended persons there, high and low, at the ministry of the Church, that I think there wants but little more than a learned, talkative, and subtle Quaker preacher to persuade a great many of them to Quakerism."<sup>3</sup> So bold had the Quakers become in Nansemond that one of their teachers had openly, in the face of the county court, attacked the doctrines, discipline and ministry of the Church. It is not recorded that he was in any way punished for this.<sup>4</sup>

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<sup>1</sup> Spotswood's Letters, I., 120.

<sup>2</sup> Janney, II., p. 201.

<sup>3</sup> Perry's Hist. Collection relating to the American Colonial Church, I., 333.

<sup>4</sup> Perry, p. 333 ff. Mr. Forbes's letter is also interesting in that it contains the first undoubtedly authentic reference to Baptists in Virginia. The Baptists, however, did not attain to a position of any importance for many years after this time.

It is probable that the increase of the Quakers here noticed was confined to the southeastern section of the colony. To the north of James River, the parishes were more regularly supplied with ministers, and, since the tobacco was better, probably with better ministers. At the same time the laws for the enforcement of parish duties upon all were still, as had been the case from the first, more strictly executed. Evidence of this is found in the case of Robert Jordan, who was imprisoned in 1720, and again in 1724, in Elizabeth City county for obstinate refusal to pay tithes and for disrespectful language to the court when sued.<sup>1</sup>

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<sup>1</sup> Janney, III., 270.

## III.

## THE HUGUENOTS AND THE GERMANS.

Leaving the regular Dissenters for a time, it becomes necessary to describe briefly a class of Virginia's population, which, occupying a somewhat anomalous position, may be said to form a connecting link between these Dissenters and the Established Church. This class was made up of the Huguenots of Manakin Town and the less important Germans of Germanna. Certain principles were involved in the location of these settlements by the authorities of Virginia which are of importance in our study because of their later extension to the Dissenters themselves.

When, after the Revocation of the Edict of Nantes, the Huguenots began to escape from France to all the Protestant countries of Europe, their desirability as colonists for the Plantations was quickly recognized by the English government. It was also appreciated by the influential men in the colonies. Thus in 1698, when the Lords of the Council of Trade and Plantations were engaged in making preparations for sending a large company of them to America, Colonel Byrd submitted to that body a paper giving reasons why Virginia should be selected as their destination.<sup>1</sup> His arguments were convincing, and in the year 1700 about five hundred of the refugees were landed in the colony.

Dr. Brock, in his introduction to "Huguenot Emigration to Virginia," says of these: "They appear to have settled at different points; a portion about Jamestown, some in Norfolk county, others in Surrey, and two hundred or more at a spot some twenty miles above Richmond, on the south side

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<sup>1</sup> Huguenot Emigration to Virginia (Virginia Historical Collection, vol. V.), pp. 5 ff.

of James river (now Powhatan county), where ten thousand acres of land, which had been occupied by the extinct Manakin tribe of Indians, were given them."

The settlement at Manakin Town was an especial care to the colonial government. In December, 1700, in order to encourage the refugees "to settle and remain together as near as may be to the said Manakin Town," an act was passed by the Assembly making the settlement a distinct parish under the name of "King William's Parish in the County of Henrico," and exempting it from public and county levies for seven years. This act made the refugees practically independent in church affairs. They made their own arrangements with ministers, and French was at first used in the services. The services were, however, those of the Church of England.<sup>1</sup> The Huguenot Church was, in fact, looked upon as a part of the regular Establishment. Thus, not long after the creation of the parish, its inhabitants met, according to the law of Virginia, and chose vestrymen, who, although they were called "antiens," seem to have performed the duties of their office just as did the vestrymen of other parishes.<sup>2</sup>

The policy of the colonial government in settling the Huguenots at Manakin Town is clearly set forth in a communication, dated August 12, 1700, from Governor Francis Nicholson to the Lords of Trade.<sup>3</sup> The communication states: "There is a great deal of good land and unpatented, where they may at present be altogether, which we thought would be the best for His Majesty's service and interests, and that they would be strengthening to the frontiers, and would quickly make a settlement, not only for themselves, but to receive others when His Majesty shall be graciously pleased to send them."

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<sup>1</sup> Meade, I., 466.

<sup>2</sup> Cf. "The Answer of Abraham Sallé to the Petition of Mr. Philipe" (Huguenot Em. to Va., 69 ff.).

<sup>3</sup> Virginia Hist. Coll., VI.

The conflicts of the early colonists of Virginia with the Indians are well known. The Indian massacres of 1622 and 1644 are landmarks in Virginia colonial history. The statute books are full of legislation in regard to frontier forts, rangers, and other means of defense. The opposition of Sir William Berkeley to carrying on war with the Indians was one of the causes of Bacon's Rebellion in 1676. Bacon, in his campaign against the Indians, had destroyed this very band of Manakins; but so great was the fear of the Indians remaining in the vicinity that the land of the tribe was still unoccupied at the time of the coming of the Huguenots, twenty-four years later. In the settlement of the valley of the James, no advance had been made beyond the falls of the river, where Richmond now stands. Accordingly, while doing everything in its power to advance the interests of the refugees, the government was not disposed to let slip such an opportunity for establishing still further in the wilderness the frontiers of the colony.

The same principle was involved in the settlement of the Germans at Germanna by Governor Spotswood in 1714. The frontiers continued to be subject at different points to Indian incursions, and Governor Spotswood had formed the design of using certain tributary tribes as a means of defense. But the Tuscaroras had repudiated their bargain and failed to take the position assigned them. Just at this time the Germans came to Virginia. Governor Spotswood, in a letter of July 21, 1714, to the Lords Commissioners of Trade, says of them: "I continue, all resolved, to settle out our tributary Indians as a guard to the frontiers, and in order to supply that part, which was to have been covered by the Tuscaroras, I have placed here a number of Protestant Germans, built them a fort, and finished [furnished?] it with two pieces of cannon and some ammunition, which will awe the straggling parties of northern Indians, and be a good barrier for all that part of the country."<sup>1</sup>

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<sup>1</sup> Spotswood's Letters, II., 70.

This party of Germans had been induced to come over to Virginia by the Baron de Graffenreidt, who had obtained an order from Queen Anne to the Governor of Virginia that they be furnished with land on their arrival. They were skilled in mining operations, and it was hoped that ore might be found in Virginia. Baron de Graffenreidt, however, had been unsuccessful in his undertakings and had left America before the coming of the party. They were thus left entirely at the disposal of the government of Virginia, and were settled on the frontier, on the Rappahannock river, some distance above where Fredericksburg now stands. An act to exempt them from levies was passed, and they were taken under the special protection of the Governor and several other gentlemen who were interested in the development of Virginia's iron mines.<sup>1</sup>

In February, 1716, their number altogether—men, women and children—was about forty.<sup>2</sup> In 1717, about eighty more came over.<sup>3</sup>

The first of the Germans had been accompanied by their own minister, but, he being very old, a petition was addressed in 1720 to the "Venerable Society for Propagating the Gospel in Foreign Parts," asking its aid in securing means with which to pay the salary of a younger minister and to build a church. It was proposed that the young minister should be ordained in England, and that he should bring over with him for use in public worship the liturgy of the Church of England translated into German.<sup>4</sup> What success the petition met with is not known. It shows, however, the willingness of the German settlers to become a part of the Established Church of Virginia, just as the French at Manakin Town had become a part of it.

The proposed connection of the Germans with the Church of Virginia was not a demand made upon them by the government. The government was willing to allow them to

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<sup>1</sup> Spotswood's Letters, II., 95.    <sup>2</sup> *Ibid.*, II., 285.    <sup>3</sup> Meade, II., 73.

<sup>4</sup> The petition is given in Meade, II., 75.



worship as they pleased. It was a step proposed by the Germans themselves because of the benefits that would arise from it. The same is true in the case of the French. There is no evidence that any demand was made upon them that they should conform themselves to the Establishment. It was, however, clearly to their interest to do so, and they could in this way show their desire to become thoroughly identified with the people with whom their lot was cast.

Although, as it appears from the foregoing, the Huguenots soon after their arrival in Virginia identified themselves with the Established Church, and the Germans at least declared their willingness to do so, it should be remembered that both parties were at first, so far as the Church of Virginia was concerned, Dissenters. The government, in receiving them and settling them upon the frontiers, set precedents which were soon followed in the case of other Dissenters.

## IV.

## THE PRESBYTERIANS.

Under the administration of Governor Gooch, who came to Virginia in 1727, the settlement of the frontiers was vigorously prosecuted. It is not necessary to trace minutely the different steps of the settlement. The general policy of the government was to grant patents to all applicants, without discrimination as to their religious preferences, on condition that within a given time a required number of settlers should be located on the grants. In 1732 the first regular settlement in the Valley of Virginia was made under one of these grants by Joist Hite and sixteen families from Pennsylvania, and from this time its occupation went steadily on. The first settlers were principally Germans, Scotch-Irish, and English. They came at first largely from Pennsylvania; later on, directly from Europe and the older portions of Virginia. Many denominations were represented among them: Presbyterians, Lutherans, Quakers, Mennonists, and Tunkers. To these must be added the adherents of the Established Church who came over the mountains from Eastern Virginia. However, at the time of the formation of Augusta and Frederick counties in 1738, the Dissenters greatly outnumbered the regular Churchmen.

Augusta and Frederick were formed so as to give the inhabitants of Western Virginia the benefits of civil government, and they embraced the whole territory of the colony west of the Blue Ridge mountains. By the law of Virginia, whenever a new county was formed, a parish was formed at the same time. The county and parish were one. The act by which Frederick and Augusta were formed is headed "An Act for erecting two new Counties and Parishes, and granting certain encouragements to the inhabitants thereof." The

one was "to be called by the name of the county of Frederick and Parish of Frederick"; the other was "to be called by the name of the county of Augusta and Parish of Augusta." The eighth section of the act provided for the election by the "freeholders and housekeepers" of each of the parishes, of a vestry, to be composed of "twelve of the most able and discreet persons" of the said parish. These were to take "the oaths appointed by the law," and to subscribe to be conformable to the "doctrine and discipline of the Church of England." At first sight it would seem that it would be hard to find in counties whose population consisted almost entirely of Dissenters twelve representative men qualified to take the oaths. But such was not the case. The leading men of the section, knowing that each parish, as soon as it had been once established, was in itself practically independent, overcame what scruples they may have had in the premises and carried out this provision of the law. The Governor had been directed to delay the execution of the act till in his opinion the number of inhabitants of Western Virginia was sufficiently great. This time came in 1744. Then the courts and vestries of the two counties and parishes were duly organized. Of the first vestry of Frederick little is known. The names of its members have not been preserved.<sup>2</sup> In 1752, however, it was dissolved by the General Assembly and a new election ordered, on the grounds that funds had been misappropriated by it. On the other hand, particulars in regard to the vestry and church of Augusta parish are much fuller.<sup>3</sup> In this parish the population was largely Scotch-Irish. The election of a vestry took place in 1746. Peyton, in his "*History of Augusta County*," says of this vestry: "The first vestry of Augusta Parish was doubtless largely composed of Dissenters, men who, so far as religion was concerned, were politically Episcopalians and doctrinally Presbyterians, but willing to submit outwardly to the powers

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<sup>1</sup> Hening, V., 78.

<sup>2</sup> Meade, II., p. 211.

<sup>3</sup> See Peyton's *History of Augusta County*.

in being, while they held themselves free to have their own private opinions." The members of the vestry seem to have attended to the duties of office very much in the manner of men who, having carried out the letter of the law, had a full appreciation of their own authority. Thus, when the first minister came up from Williamsburg with letters from Governor Gooch, the vestry determined to receive him provided that he would not insist upon the purchase of glebe land and the erection of buildings thereon for two years. The buildings, including the church, were not finished till 1753 or 1754.<sup>1</sup> In the meanwhile, the courthouse was used for religious services. In the regulation of church services, a spirit of compromise was displayed. The minister was a regularly ordained Episcopalian, but Dissenters sometimes occupied his pulpit.<sup>2</sup> Gown and surplice were not used by the minister, and the congregation received the sacrament standing. But this offshoot of the Established Church did not flourish. The congregation dwindled away when, owing to the increase of Presbyterian ministers in that section, the people had an opportunity of worshiping in a manner more in accordance with their preferences.

Though the early settlers of the Valley of Virginia were composed of men of various denominations, the Presbyterians appear to have been for many years the only Dissenters who had their own regular ministers. Contemporaneous with the settlement of the Valley, families of Presbyterian origin had also established themselves along the frontiers to the east of the Blue Ridge mountains, in the present counties of Albemarle, Nelson, Prince Edward, Charlotte, and Campbell.<sup>3</sup> In the year 1738, the Rev. Mr. Anderson, of the Synod of Philadelphia, visited Governor Gooch in the interest of a number of Presbyterians who were meditating a settlement on the frontier of Virginia. He brought with him an address from the Synod to the Governor, which prayed that these

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<sup>1</sup> Peyton's History of Augusta County, 100.

<sup>2</sup> *Ibid.*, p. 97.

<sup>3</sup> Foote, Sketches of Va., p. 102.

settlers might be allowed the "liberty of their consciences and of worshipping God in a way agreeable to the principles of their education." Governor Gooch in his reply says: "And as I have always been inclined to favor the people who have lately removed from the provinces to settle on the western side of our great mountains: so you may be assured that no interruption shall be given to any ministers of your profession who shall come among them, so as they conform themselves to the rules prescribed by the Act of Toleration in England, by taking the oaths enjoined thereby, and registering the place of their meeting, and behave themselves peaceably toward the government."<sup>1</sup> Though nothing is here said about Presbyterian settlers to the east of the mountains, these are evidently included in the expressed good-will of the Governor; for the very company referred to in the address established themselves in Charlotte, Prince Edward, and Campbell counties, all east of the Blue Ridge. These counties were, however, at that time remote from the centers of population.

In his dealings with settlers who were Presbyterians from the time of their first coming into the colony, Governor Gooch seems to have been always fair. They were allowed toleration. Visiting ministers preached to them from time to time, and in 1740 the Rev. Jno. Craig took up his residence in Augusta county.<sup>2</sup>

About the same time the Rev. Mr. Black settled in Nelson county.<sup>3</sup> Gooch was himself a Scotchman and appreciated the views of the Presbyterians. At the same time he never lost sight of his plan for strengthening the frontiers.

But very soon the question became complicated by a division that took place in the Synod of Philadelphia, and by the spread of Presbyterian doctrines in counties whose population was originally Episcopalian. The division of the Synod and the spread of Presbyterianism in Virginia were both the results of the great religious revival extending at that time

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<sup>1</sup> Given in Foote, p. 104.

<sup>2</sup> Peyton, p. 80.

<sup>3</sup> Foote, p. 119.

throughout the English colonies in America. The general revival has been called the "Great Awakening of 1740," but it was not confined to that year.<sup>1</sup> It had commenced several years before that date, and it continued for some time after. It had sprung up independently in America before the coming of Whitefield, but it was greatly augmented by the preaching of that wonderful man. The ideas emphasized in the revival were the necessity of the new birth for salvation and the ability of the convert to recognize the change in his spiritual nature,—doctrines which had been largely lost sight of by all the churches. Religion had become a matter of form, not of experience. The revival, then, was a protest against this formalism, and it affected all denominations. In the controversies that it either started or augmented, the Baptist and the Presbyterian churches were both split in two; the Baptist into Regular and Separate, the Presbyterian into Old Side and New Side. Among the Presbyterians, the Synod of Philadelphia was Old Side; New Side were the Presbyteries of New Castle, New Brunswick, and New York. The whole movement was called by its opponents the "New Light Stir," and its preachers "New Lights."

Before the coming of any of these preachers into Virginia, reports of the religious excitement prevailing in the North had reached the people of that colony.<sup>2</sup> In Hanover county, a small company of those who had been stirred by the reports began to meet together for the reading of such religious works as they could secure. Mr. Whitefield came to Virginia in 1740 and preached at Williamsburg, but the small band of Dissenters in Hanover county did not have an opportunity of hearing him. They continued to increase, however, and after a time found it necessary to build a house for their meetings. In the meanwhile they had obtained a copy of Whitefield's sermons delivered in Glasgow. The mere reading of these sermons produced a remarkable effect,

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<sup>1</sup> Joseph Tracy's "The Great Awakening," p. 11.

<sup>2</sup> The Great Awakening, p. 377.

and Mr. Morris, the leading spirit of the movement, soon began to be invited to read them in other places. Thus the revival spread. The authorities of the colony, taking notice after a time of the growing dissent, called upon the company to declare to what sect they belonged. Here was a difficulty. They did not know by what name to call themselves. Their dilemma is thus described by Mr. Morris: "As we knew but little of any denomination of Dissenters except Quakers, we were at a loss what name to assume. At length, recollecting that Luther was a noted reformer, and that his doctrines were agreeable to our sentiments, and had been of special service to us, we declared ourselves Lutherans; and thus we continued till Providence afforded us an unexpected opportunity of hearing the Rev. Mr. William Robinson."<sup>1</sup> Mr. Robinson had been sent as an evangelist in the winter of 1742-1743 by the New Side Presbytery of New Castle to visit the Presbyterian settlements of Virginia and North Carolina. In Virginia he had labored principally on the east of the Blue Ridge mountains, in the counties of Charlotte, Prince Edward, Campbell, and Albemarle.<sup>2</sup> His fame having reached Hanover county, the Dissenters there sent him an invitation to visit them.

Mr. Robinson came in July, 1743, and continued with them four days. He was the first Presbyterian minister that preached in Hanover county. Mr. Robinson was followed by Mr. Jno. Blair. Under the public preaching and private instruction of these ministers the Hanover Dissenters were strengthened in their Presbyterian views, and they put themselves under the care of the Presbytery of New Castle.

In the winter of 1744-45 the Presbytery sent the Rev. John Roan as a supply to the people of Hanover. Mr. Roan was a more extreme type of revivalist than his predecessors, and

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<sup>1</sup> Given in *The Great Awakening*, p. 373. According to another account, however, some of them at least seem to have given up the name of Lutherans before the coming of Mr. Robinson. A Presbyterian Confession of Faith had come into their hands, which they recognized as containing their beliefs. (Foote, p. 124.)

<sup>2</sup> Foote, p. 126.

his zeal led him into making violent denunciations of the ministry of the Established Church. The clergy and their friends became thoroughly aroused. Before this time the Dissenters of Hanover had not met with any very special opposition from the authorities. They had, indeed, been called upon to declare to what denomination they belonged; but, having done this, they had been allowed to meet together as they pleased, although their meeting-houses had not been registered according to law. Having no licensed preachers and no licensed houses of worship, they were, of course, finable for absence from the parish church, and the law was to this extent sometimes put in force against them.<sup>1</sup> But the authorities did not proceed to extreme measures till the time of the excitement occasioned by the preaching of Mr. Roan. Mr. Roan himself had not obtained a license according to the Toleration Act, and he delivered denunciatory harangues in unlicensed houses. He was, then, in the eyes of the authorities, an itinerant come to stir up discord and schism. Governor Gooch had promised toleration under the law to ministers of the Synod of Philadelphia who should visit the Scotch-Irish settlements on the frontiers, but, in his opinion, the Toleration Act had not been passed for the benefit of proselyters. Accordingly, at the meeting of the General Court in April, 1745, he delivered to the grand jury a long and earnest charge in reference to the matter.<sup>2</sup> It begins as follows: "Gentlemen of the Grand Jury,—Without taking notice of the ordinary matters and things you are called to attend, and sworn to make inquisition for, I must on this occasion turn your thoughts and recommend to your present service another subject of importance, which I thank God has been unusual, but I hope will be most effectual. I mean the information I have received of certain false teachers that are lately crept into this government, who, without order or license, or producing any testimonial of their education or

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<sup>1</sup> Foote, p. 133.

<sup>2</sup> The charge is given in Burke's History of Virginia, III., 119 ff. Foote's Sketches, p. 135.



sect, professing themselves ministers under the pretended influence of new light, extraordinary impulses, and such like satirical<sup>1</sup> and enthusiastical knowledge, lead the innocent and ignorant people into all kinds of delusions," etc. In this strain the charge continues. The Governor had at first promised himself that "either their preaching would be in vain, or that an insolence so criminal would not be connived at." But since the "workers of a deceitful work" were drawing disciples after them, and longer forbearance was dangerous, the jury was exhorted to take measures for putting "an immediate stop to the devices and intrigues of these associated schismatics." For they had not complied with the provisions of the Toleration Act. And even if they had done so, they would have forfeited by their violent course "the privilege due to such compliance." In conclusion, however, Governor Gooch advises that the zeal of the court and jury in the maintenance of religion be shown, "not as the manner of some is by violent oppression, but in putting to silence by such methods as our law directs the calumnies and invectives of the bold accusers, and in dispelling, as we are devoutly disposed, so dreadful and dangerous a combination." It will be seen from this charge that although he was incensed at the reports which had reached him of the boldness of the New Lights in denouncing the Established Church, Governor Gooch was not disposed to go beyond the letter of the law in his efforts to suppress them. His position is further clearly stated in the reply made by him to an address from the Synod of Philadelphia. A copy of the Governor's charge to the grand jury had been sent from Virginia to the Synod, and that body was not slow to disclaim all responsibility for the actions of the persons complained of. In the language of the address, these persons "are missionaries sent out by some who, by reason of their divisive and uncharitable doctrines and practices, were, in May, 1741, excluded from our

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<sup>1</sup> Probably fanatical, as given in Briggs's "American Presbyterianism," p. 25.

synod, upon which they erected themselves into a separate society, and have industriously sent abroad persons whom we judge ill-qualified for the character they assume, to divide and trouble the churches." Governor Gooch, in his reply dated June 20, 1745, states that he had not been so uncharitable as to think that men of Presbyterian education and profession could be guilty of the conduct which had caused his charge to the grand jury. The reply closes as follows: "As the wicked and destructive doctrines and practices of itinerant preachers ought to be opposed and suppressed by all who have concern for religion, and just regard for public peace and order in church and state, so your missionaries producing proper testimonials, complying with the laws, and performing divine service in some certain place appropriated for that purpose, without disturbing the quiet and amity of our sacred and civil establishments, may be sure of, Reverend sirs, your most humble servant, William Gooch."

The grand jury, in the meantime, had, on April 19, 1745, presented John Roan "for reflecting upon and vilifying the established religion," in several specified expressions; Thomas Watkins for the same offense; and Joshua Morris "of the parish and county of James City, for permitting John Roan, the aforementioned preacher, and very many people to assemble in an unlawful manner at his house, on the 7th, 8th, and 9th of January last past."<sup>2</sup> Mr. Roan had, however, before the meeting of the General Court, returned to Pennsylvania. The cases were continued till the next meeting of the court.

The next month after these presentments were made, the Presbyterians of Hanover county sent four of their number to lay their case before the Presbyteries of New Castle and New Brunswick. These two Presbyteries held a session under the title of "Conjunct Presbytery." Some months after this, in September, 1745, the Synod of New York was

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<sup>1</sup> Foote's Sketches, 139 and 140.

<sup>2</sup> Records of the General Court, quoted in Foote, p. 137 ff.

formed by the union of the Presbytery of New York and the two Presbyteries already named. The "Conjunct Presbytery" of New Castle and New Brunswick, however, took the cause of the Virginia Presbyterians immediately in hand. An address to Governor Gooch was drawn up, and sent by the hands of Messrs. Gilbert Tennant and Samuel Finley, two of the most prominent leaders of the New Side party. Messrs. Tennant and Finley, it seems, found no trouble in explaining to Governor Gooch the status of affairs in the Presbyterian Church. They were kindly received, and allowed to preach in Hanover county. They remained only a week, but after their departure the regular meetings for prayer and reading sermons were continued.

At the next term of the General Court (October, 1745) the cases of Thomas Watkins and Joshua Morris were continued. It is not necessary to trace the history of all these cases to their conclusion. They were all vigorously contested by attorneys for the king and attorneys for the defendants, and in only two cases were convictions reached. These were not finally decided till the April term of the court, 1748. They were the cases of Isaac Winston and Samuel Morris, both charged with allowing unlawful assemblies at their houses. The following record of the case of Isaac Winston was made by the clerk of the court on April 19, 1747: "This day came as well the Attorney General of our Lord the King, as the defendant by his attorney; and thereupon came a jury—(here follow the names of the jury)—who being elected, tried and sworn the truth to speak upon the issue joined, brought in a special verdict in these words, to wit—We find the people did assemble at the house of the defendant, but not in a riotous manner, and that John Roan preached in said house, but not against the canons of the Church of England as set forth in the information;—and the cause is continued till the next court for the matters of law arising thereupon to be argued."<sup>1</sup> The record in regard to

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<sup>1</sup> Foote, p. 161.

Morris's case is of similar import. The questions of law were finally argued in April, 1748, and the following decision in Winston's case was rendered: "The matter of law arising upon the special verdict being argued, it is considered by the court that the said Isaac make his fine with our Lord the King, by the payment of twenty shillings to his Majesty's use, and that he pay the costs of prosecution."<sup>1</sup>

The same decision was rendered in the case of Morris. Throughout these prosecutions the sympathies of the petit juries seem to have been decidedly with the defendants. No case was brought to trial in the county courts. Several presentments, indeed, were made by the grand jury of the county of Hanover in November, 1746, but in May of the following year the attorney-general of Virginia had these cases removed by legal process to the General Court. The attorney-general at that time was Sir John Randolph, probably the most skillful lawyer in the colony, and he embarked with all his vigor into the prosecution. He evidently thought that convictions could be more readily reached in the General Court than elsewhere. The juries empaneled by this court in Williamsburg would certainly be more hostile toward Dissenters than would juries of the counties in which the revival movement was spreading. The fact that under these circumstances he secured only two verdicts from juries—and these, indeed, only in regard to the most evident matters of fact—shows to what an extent liberal ideas in religion had made their way among the people at large.

But the surest way of reaching the Dissenters through the law was by means of fines for absence from church.<sup>2</sup> Such cases were tried by justices of the peace, who were appointed by the Governor, and thus, to an extent, independent of the people. Since the Presbyterian meeting-houses were not licensed until April 14, 1747, those who attended services in them, to the neglect of the services of the parish churches, were for several years liable to the penalties of the law. But

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<sup>1</sup> Foote, p. 168.

<sup>2</sup> Hening, III., 361.

it is hardly possible now to judge how far the law was enforced. Mr. Samuel Morris records that he himself was repeatedly fined for non-attendance at church. Mr. Morris, however, was the leader of the movement, and on this account more likely to be singled out for prosecution. It is not probable that others were so strictly dealt with.

Leaving the legal proceedings against individual Presbyterians, and resuming our consideration of the denomination as a whole, we find that after the Reverends Gilbert Tennant and Samuel Finley left them in 1745 they were visited by the Reverends William Tennant and Samuel Blair. Later, Mr. Whitefield himself preached for them. Mr. Morris says of him: "Mr. Whitefield came and preached four or five days, which was a happy means of giving us further encouragement and of engaging others to the Lord, especially amongst the Church people, who received the Gospel more readily from him than from ministers of the Presbyterian denomination."

Mr. Morris proceeds in his account of the Presbyterians as follows: "After his departure, we were destitute of a minister, and followed our usual method of reading and prayer at our meetings, till the Rev. Mr. Davies, our present pastor, was sent by the Presbytery to supply us about six weeks, in spring, anno 1747, when our discouragements from the government were renewed and multiplied: for on one Sunday, the Governor's proclamation was set up at our meeting-house, strictly requiring all magistrates to suppress and prohibit, as far as they lawfully could, all itinerant preachers, &c., which occasioned us to forbear reading that day, till we had time to deliberate and consult what was expedient to do; but how joyfully were we surprised before the next Sabbath, when we unexpectedly heard that Mr. Davies was come to preach so long among us; and especially that he had qualified himself according to law and obtained the licensure of four meeting-houses among us, which had never been done before!" It seems from this extract that Governor Gooch

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<sup>1</sup> Given in "The Great Awakening," p. 374 ff.

had determined to go to such lengths as the law allowed in his efforts to check the spread of Dissent. But even if he were so disposed, he could not, as he thought, lawfully oppose the licensing of properly qualified ministers who made application for such license. And throughout the whole controversy it is evident that his antagonism was aroused, not by regular Dissenting ministers, but by itinerants who went from place to place scattering the seeds of religious disorder. Accordingly, when Mr. Davies petitioned the General Court for license to preach at specified places, Governor Gooch favored the granting of the petition.

It will be recalled that the Rev. Josias Mackie obtained his license from the county court of Norfolk county in 1692, and that the Rev. Francis Makemie's license was granted him in 1699 by the county court of Accomac. But the practice was now different. The General Court reserved to itself entire jurisdiction in all such questions. Thus, when the county court of New Kent, in 1750, granted a license for a meeting-house in that county, the license was promptly revoked by the General Court. The reason for such a course is evident. The General Court consisted of the Governor and his Council; and the Council, made up of the leading representatives of the office-holding aristocracy of the colony, was naturally inclined toward the repression of all innovations both in Church and in State proceeding from the masses. Throughout the whole controversy in regard to the rights of the Presbyterians in Virginia, the Council always showed itself more narrowly conservative than the Governor. Whereas the Governor, acting under his instructions from the crown,<sup>1</sup> aimed to carry out the provisions of the Toleration Act in the manner indicated above, members of the Council claimed the right to put their own construction upon this act as incor-

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<sup>1</sup> A letter written in 1750 by Commissary Dawson to the Bishop of London shows that the instructions given to Governor Gooch in regard to Dissenters were the same as those which were given to Governor Culpeper. These instructions have been quoted above, pp. 29, 30. The letter is given in Perry, p. 366.

porated into the laws of Virginia. In addition to this, in execution it should be brought into harmony with laws already in force.<sup>1</sup> There was no reason, then, so it seemed to the members of the Council, why the act should be construed in Virginia as it was construed in England. However, at the meeting of the court that took under consideration the application of Mr. Davies for license, the view of the law held by Governor Gooch finally prevailed. Mr. Davies was licensed to preach at four specified places.<sup>2</sup>

Mr. Davies did not at this time settle in Virginia, but, after preaching there for several months, returned home. In the spring of 1748, however, he was regularly called to take pastoral charge of the congregations in Hanover and adjacent counties. When he came to Virginia for the second time he was accompanied by the Reverend John Rodgers, who had been appointed by New Castle Presbytery to engage for some months in Virginia in the work of an evangelist. Mr. Davies and Mr. Rodgers went straight to Hanover county, and having preached there, proceeded to Williamsburg to obtain a license for Mr. Rodgers. But disappointment here awaited them. Not only was Mr. Rodgers absolutely refused a license, but some of the Council proposed even to revoke the one formerly granted to Mr. Davies. Not only this, there was some talk of prosecuting Mr. Rodgers for having already preached without a license. Governor Gooch, true to his general policy, favored the petition, but was not able to overcome the opposition of the majority of the Court. So Mr. Rodgers was compelled to leave Virginia without fulfilling his mission, and Mr. Davies returned alone to Hanover county.<sup>3</sup>

After Mr. Davies became regularly settled in Virginia, he preached with such zeal and eloquence that the desire to hear him spread far and wide. People who were compelled to come great distances to gratify this desire began to petition

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<sup>1</sup> Especially the law according to which the Governor was the judge of the credentials of ministers.

<sup>2</sup> Foote, p. 160.

*ibid.*, p. 165.

the General Court for the licensing of houses in their own neighborhoods. Mr. Davies went to Williamsburg to plead in person for these licenses. It is probable that Attorney-General Randolph fought the petitions with all his ability. There are no authentic accounts of the arguments used *pro* and *con*, but tradition has it that Mr. Davies handled his case so well that the whisper went around the company of lawyers present, "The attorney-general has met his match to-day." The petitions were granted, and Mr. Davies was allowed to meet congregations at three new places. This was in November, 1748, just half a year after the refusal to license Mr. Rodgers. Mr. Davies had now seven places for preaching: three in Hanover county, one in Henrico, one in Goochland, one in Louisa, and one in Caroline.

Although the General Court of Virginia had refused to license Mr. Rodgers in 1748, this did not stop the coming of Presbyterian evangelists into the colony. The Rev. Mr. Davenport came to Virginia and preached in the summer of 1750. Whether or not he obtained a license is not recorded, but it is probable that he did not do so. About this time the president of the Council of Virginia had written to the Bishop of London asking that he bring the affair of the Virginia Dissenters before the King in Council,<sup>1</sup> and while the General Court professed itself waiting for advice from England no new license would be granted. It was at this time that the county court of New Kent granted the petition of several householders of that county for the license of a meeting-house for Mr. Davies. However, as has been seen, the license was promptly revoked by the General Court. Whatever might be the nature of the advice to come from England, the General Court was determined to keep the matter of licensing in its own hands. And it seemed to this body that, under the most liberal construction of the law possible, seven meeting-houses were certainly enough for a man who claimed to be a regular minister and not an itinerant.

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<sup>1</sup> Cf. Mr. Dawson's letter to the Bishop of London, Perry, p. 379; Mr. Davies's letter to Dr. Avery, Foote, p. 210.



The clergy, also, through their commissary, Mr. Blair, made a presentation of the state of religious affairs in Virginia to the Bishop of London. Mr. Davies, being informed of this, prepared a statement for the Bishop of London, which, however, was never presented; and wrote several letters to Dr. Doddridge and Dr. Avery, leading Dissenting divines in England, so as to excite their interest in behalf of the Dissenters in Virginia. These ministers took up the case with spirit, and several communications on the subject passed between Dr. Doddridge and the Bishop of London. From these sources it is easy to arrive at the claims made by the different parties to the controversy.<sup>1</sup>

The Bishop of London agreed with Attorney-General Randolph that the Act of Toleration itself confined Dissenting preachers to the specified places for which they had obtained license to preach. This had been admitted in England to such an extent that the Dissenters had obtained an insertion of a clause in the act of the 10th of Queen Anne, making it lawful for a Dissenting minister to preach occasionally in other counties in addition to the one in which he had obtained his license. Since the law of the 10th of Queen Anne had not been incorporated into the laws of Virginia, but only the law of the 1st of William and Mary (the Toleration Act itself), the Bishop of London's view was entirely favorable to the contention of the Church party in Virginia. But in his letter to Dr. Doddridge the Bishop of London declares that he is opposed to all methods of severity. In regard to the indictment of persons in Virginia for religious offenses he says: "Of this I have heard nothing. But give me leave to set you right on one thing, and to tell you that my name neither is or can be used to any such purpose. The Bishop of London and his commissaries have no such power in the Plantations, and I believe they never desired to have it; so

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<sup>1</sup> Some of the letters are given in Foote's Sketches, others in Perry's Collections.

that if there be any ground for such complaint, the civil government only is concerned.”<sup>1</sup>

The letter of Dr. Doddridge to the Bishop of London shows the common practice in England in regard to Dissenting ministers. There was no such thing as licensing particular persons to preach in particular places. Any licensed minister might preach in any licensed meeting-house if the proprietor of the place so wished. And when a license was desired for a new meeting-house, it was only necessary for three persons (one of whom must be the proprietor of the place) to make application to the justices at the quarter-sessions of the county.<sup>2</sup>

This was the construction of the law for which Mr. Davies and his Virginia friends were contending. It will be noticed, however, that the English practice had grown up under the Act of Toleration as enlarged by the law of the 10th of Queen Anne. In Virginia only the Act of Toleration itself had been incorporated, and the General Court had insisted upon keeping the execution of it under its own immediate supervision.

But the law of William and Mary was broad enough for Mr. Davies to base upon it one of his strongest arguments showing why the General Court should allow him a greater number of licensed meeting-houses. This law enacted, “That all the laws made and provided for the frequenting divine services on the Lord’s Day shall be in force and executed against all persons that offend against the said laws, except such persons come to some congregation or assembly of religious worship allowed or permitted by the act.” The law passed by the Virginia Assembly compelled persons to attend the services of the Established Church once a month “excepting as is excepted in an act made in the first year of the reign of King William and Queen Mary.” etc. “But how,” Mr. Davies argued, “is it possible for them to comply with this injunction, if they are restrained to so small a number of

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<sup>1</sup> Perry, p. 372. Foote, p. 179.

<sup>2</sup> Perry, p. 374 ff.

meeting-houses as that they cannot attend them? If the Act of Toleration imposes this restraint upon them, does it not necessitate them to violate itself?" The necessity of asking that so many places be licensed for one man arose from the sparseness of the Dissenting population in a new country and the dearth of ministers to take oversight of them. Under such circumstances the minister who had a large number of preaching places could not be classed as an itinerant. He was merely in the position of many of the ministers of the Established Church, who in large parishes had, in addition to the regular churches, several chapels for the accommodation of their parishioners. The refusal to grant him further licenses because his congregation was increasing at the expense of the Established Church, Mr. Davies showed to be also unreasonable. If it was not illegal for a man to change his opinions, the benefits of the Toleration Act could not be confined to those who were Dissenters by birth and education.<sup>1</sup>

In these arguments Mr. Davies came to the root of the whole matter. When the narrowness of the construction put upon the law by his opponents was shown again and again (as we may believe it was shown by Mr. Davies before the court and elsewhere), it could not be long before popular sentiment would compel the court to give way.

In the meantime, Mr. Davies does not seem to have given strict obedience to the law in the narrow construction put upon it by the General Court. He did not confine himself always to the places at which he had license to preach, but from time to time made missionary visits to the section of country lying to the south and southwest of Hanover county. This section, embracing the present counties of Cumberland, Powhatan, Prince Edward, Charlotte, Campbell, Nottoway, and Amelia, was at that time frontier territory, and it will be remembered that many Scotch-Irish families had settled there. But Mr. Davies preached wherever he stopped, and

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<sup>1</sup> See Mr. Davies's Letter to the Bishop of London, Foote, p. 180 ff.

there are no accounts of his having ever been interfered with. It was only in the older counties that he was not allowed to preach by the General Court.

At the same time the Synod of New York did not forget the necessities of the inhabitants of the "back parts" of Virginia. In 1752 Mr. Henry and Mr. Greenman were sent to preach among them. Whether or not these gentlemen obtained licenses is not known. Since, however, they were come to preach upon the frontier to people who were already Presbyterians, it is probable that licenses, if applied for, were granted them without opposition. One of these ministers, Mr. Henry, settled in Virginia, and some years after this (in 1755) was regularly installed as pastor of two churches, one in Charlotte county, the other in Prince Edward. At this time he must have had a license. In 1752, also, Mr. Todd came to Virginia to act as assistant to Mr. Davies. At this time Governor Gooch had returned to England and Governor Dinwiddie was at the head of the government of the colony. The argument against granting Mr. Davies any more licenses for meeting-houses had been that he could not have so large a territory without becoming an itinerant, and that itinerants were not tolerated by the law of Virginia. The court could not, therefore, with any show of consistency refuse to license Mr. Todd, who had come to relieve Mr. Davies of a portion of his charge. Accordingly the license was granted.<sup>1</sup> But when license was asked for an additional meeting-house, the court refused to grant it, saying that nothing further would be done in the matter till instructions had been received from England.<sup>2</sup>

The same year (1752) Mr. Davies received through Dr. Avery the opinion of Sir Dudley Rider, attorney-general of England, in regard to the rights of Dissenters. The opinion has not been preserved, but it was certainly favorable to the claims made by Mr. Davies.<sup>3</sup> It was not likely, however, to have much influence with the General Court, which claimed,

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<sup>1</sup> Perry, p. 393 ff.

<sup>2</sup> Foote, p. 210.

<sup>3</sup> *Ibid.*, p. 193.

as we have seen, entire freedom in the interpretation of the Toleration Act as a law of Virginia. Armed with this opinion, Mr. Davies, in June, 1753, on the eve of his visit to England in the interests of the College of New Jersey, made his final appeal to the court for the license of the meeting-house in New Kent county. The court, however, refused as before, professing to be still waiting for advice from England,<sup>1</sup> especially for the further opinion of the Bishop of London.

It has been stated that the president of the Council of Virginia, and the commissary representing the clergy, applied to the authorities in England for advice in regard to the Dissenters. The following communication on the subject from the Lords Commissioners of Trade was received by the president of the Council the latter part of 1750 or early in 1751:<sup>2</sup> "With regard to the affairs of Mr. Davies the Presbyterian, as toleration, and a free exercise of religion is so valuable a branch of true liberty, and so essential to the enriching and improving of a trading nation, it should ever be held sacred in his Majesty's Colonies; we must therefore earnestly recommend it to your care, that nothing be done which can in the least affect that great point; at the same time you will do well to admonish Mr. Davies to make a proper use of that indulgence which our laws so wisely grant to those who differ from the Established Church and to be cautious not to afford any just cause of complaint to the clergy of the Church of England, or to the people in general." But even after the reception of this very wise counsel the General Court did not become more liberal in its construction of the law. For, as we have seen, it refused after this to grant an additional license to Mr. Davies and Mr. Todd.

Although the court was thus sturdily holding out against innovations in religious matters, the Church party seem to have recognized about this time that the Dissenters had the law, putting a reasonable construction upon it, on their side.

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<sup>1</sup> Perry, p. 407.

<sup>2</sup> *Ibid.*, p. 379.

Dissenters, too, were becoming more numerous<sup>1</sup> among all classes. In this condition of affairs, several ministers drew up, in 1751, an address to the House of Burgesses, stating their grievances at length and praying for remedy. No new law, however, was asked for. It had not yet come to that. The petitioners deemed the law entitled "Ministers to be Inducted," passed first in 1643, sufficient, if it were carried into effect. But the fact that the address was made to the law-making body, and not to the General Court, indicates that there was a feeling that the laws had in some way to be revised. The address, however, was never delivered to the House of Burgesses, the leaders of the Church party thinking it inadvisable.<sup>2</sup> But the next year (1752) a bill, the object of which was to define the legal status of the Dissenters, was actually introduced in the Assembly. We know of this bill only through a reference made to it by Commissary Dawson in a letter to the Bishop of London. The commissary says in one place: "To put them under due restraint is the real intent of the bill, which being a matter of so great moment we thought proper after the first reading to submit to your Lordship's judgment." If, according to the law of the 10th of Queen Anne, a clause was to be inserted empowering a Dissenting minister to preach in any other county than the one for which he was licensed, Mr. Dawson wished to insert a proviso to the effect that there should be in the county visited a settled Dissenting preacher. "Otherwise," he says, "one teacher may and would ramble all over the country, and the grievance complained of would not be redressed."<sup>3</sup> Of this bill nothing more is heard. Even if it could have passed in Virginia, it is probable that it would have been overruled in England. The policy of the English government in regard

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<sup>1</sup> Commissary Dawson, in a letter to the Bishop of London, dated August 16, 1751, makes the following admission: "Tho' by our laws none shall be admitted to be of the vestry, who do not subscribe to be of the doctrine and discipline of the Church of England; yet many Dissenters are vestrymen, wherein I humbly request the favor of your Lordship's advice." Perry, p. 380.

<sup>2</sup> Perry, p. 380-381 ff.

<sup>3</sup> *Ibid.*, p. 384.

to Dissenters in the colonies has been clearly seen in the crown's instructions to the Governors of Virginia, and in the communication to the president of the Council from the Lords Commissioners of Trade.

But it is not certain that such a bill could have passed the Virginia Assembly at that time. Dissenters had increased greatly in numbers, and the question of their rights had been thoroughly discussed.<sup>1</sup> At the same time the ministers of the Church of Virginia were not, as a class, of such a character as to inspire the people with enthusiasm for the Establishment. And the disputes between ministers and their vestries continued to go on.

Among these disputes, the case of the Reverend Mr. Kay especially attracted at that time a good deal of attention. Mr. Kay had been received as minister of the Parish of Lunenburg in Richmond county, but, according to the general practice, had never been inducted. It was not very long before he and his vestry became involved in a serious controversy. At last his vestry shut the doors of the church against him and put persons in possession of his glebe-land. Mr. Kay brought an action in the General Court against those persons for trespass and obtained a favorable verdict. The vestry then raised the question of law, "whether a minister received by a majority in vestry and not inducted by the governor have a right to sue his vestry for trespassing upon the glebe and recover damages."<sup>2</sup> On this point, also, the court decided in favor of Mr. Kay. The vestry, hoping, probably, that the expense involved in prosecuting the case further would cause Mr. Kay to retire from it, determined to take an appeal to the King in Council. But the principle involved was such an important one that the commissary, the

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<sup>1</sup> Mr. Dawson, in the letter before referred to, says that the Dissenters had been bold enough to endeavor to obtain exemption from the payment of parochial levies. He does not state how this had been attempted. (See Perry, p. 386.)

<sup>2</sup> Perry, p. 389 ff. The action for trespass was brought against the persons who were put into possession of the glebe by the vestry, but it was recognized that these were mere agents.

clergy and the Governor made common cause with Mr. Kay, and funds were raised to defray the expenses of the appeal in England. As was to be expected, the King in Council sustained the decision of the General Court of Virginia. The case was finally settled May 15, 1753. When it is recalled how jealous the vestries were of their control over the clergy, and how largely the House of Burgesses was composed of vestrymen, it will be seen that the case of Mr. Kay would be bound to have great influence in shaping the opinion of the House in regard to Church legislation.

At the same time, too, there was another cause of discord in the Church party. Early in the year 1752 Commissary William Dawson died, and there were two applicants for the vacancy thus arising: the Reverend Mr. Smith, president of William and Mary College, and the Reverend Thomas Dawson, brother of the dead commissary. Governor Dinwiddie threw in the weight of his influence for Mr. Dawson, who, accordingly, was appointed to the position by the Bishop of London. According to a letter written in 1753 by Governor Dinwiddie to the Bishop of London, Mr. Smith, in revenge, stirred up the House of Burgesses to address a complaint against the Governor to the King in regard to the amount of the fee taken by the Governor on sealing and signing patents for land. Whether Governor Dinwiddie was correct or not in his accusations against Mr. Smith, the letter shows clearly that there was not that harmony in the Church party in Virginia which, even if other things had been favorable, could have made possible the passage of a bill by the General Assembly putting restrictions upon Dissenters.

From November 17, 1753, till February 13, 1755, Mr. Davies was absent from Virginia, having been sent by the Synod of New York on a special mission to England in the interests of the College of New Jersey. While in England, he had opportunities for consulting with leading Dissenters in regard to the state of affairs in Virginia. As a result of these deliberations, the following plan of action was agreed upon: When license was wished for any meeting-



house, application was to be made, first, to the court of the county in which the house was located, then to the General Court, and lastly to the Governor alone. If the applicants met with a refusal from each of these, they were to proceed to use the place just as if it had been licensed. In case of prosecution for this course, an appeal was to be taken to the King in Council.<sup>1</sup>

But it did not become necessary to put this plan into execution. In the first place, the number of Presbyterian ministers laboring in the territory originally occupied by Mr. Davies alone had increased by the end of the year 1755 to four. In addition to Mr. Todd and Mr. Henry, already mentioned, there was Mr. Wright, who had settled in Cumberland county. This increase of ministers rendered less plausible the excuse formerly given by the General Court for refusing to grant further licenses.

Far more powerful than this fact, however, was the influence produced on the government of Virginia and on the minds of the people at large by the French and Indian War. The war had begun in 1754, and from this time on for several years the tomahawk of the Indian was steadily at work on the frontiers. Added to the terror produced by this savage warfare, was the recognition by all that the contest was a death-struggle between England and France. If France should be victorious, the least result that could follow would be the checking of the expansion of the English colonies to the west. More than this, French victory probably meant annexation of the colonies by France, and the consequent loss by their inhabitants of the rights of free Englishmen. But possibly most alarming of all was the threatened Roman Catholicism which, it was thought, would follow French occupation. In an address to the convention of the clergy held at Williamsburg, October 30, 1754, the troubles of the times are thus referred to by Commissary Dawson:<sup>2</sup> "It would be needless to inform you in what condition the Church of Vir-

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<sup>1</sup> Foote, p. 279.

<sup>2</sup> Perry, p. 415.

ginia at present is, attacked by the blind zeal of fanaticism on the one hand, and the furious malice of popery on the other," etc. The General Assembly, on its part, passed, in March, 1756, an act for disarming Papists and "reputed Papists" who refused to take the oaths to the government;<sup>1</sup> also an act for transporting to Great Britain those of the wretched Acadians who had found their way to Virginia.<sup>2</sup>

While the government was thus doing everything in its power to solidify the people of Virginia in opposition to the foe, it would have been the height of folly to antagonize, even in the least, any part of the loyal population. In the common fear of Popery, and the common danger, minor differences between regular Churchman and Dissenter began to be overlooked. Especially was this the case since the Dissenting population of the Valley bore the brunt of the Indian attacks, and their Dissenting brethren of Hanover county and vicinity heartily supported the government in its measures for prosecuting the war. Mr. Davies by his sermons and addresses fired the people as no other man could fire them. It is related that on one occasion, in the spring of 1758, when the people were almost worn out by the war and it was difficult to find voluntary recruits for the service, Mr. Davies was invited to address the men of Hanover county at general muster. Such was the effect of his appeal that in a few minutes more volunteers offered themselves for service than were called for. It is not surprising that under such circumstances the obstacles put in the way of Dissenters came to be very much lessened.

In the meanwhile, the element of the colony's population which might have objected to this result, had its attention taken up entirely with its own affairs. The clergy was engaged in a contest of its own against both the government and the people of Virginia. This contest, which was ended by the celebrated "Parsons' Cause" in 1763, had begun as early as 1755 with the passing by the Assembly of what was

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<sup>1</sup> Hening, VII., 35.

<sup>2</sup> *Ibid.*, VII., p. 39.

called by the clergy the "Two Penny Act." The act provided that all debts due in tobacco might be paid in money at the rate of two pence per pound. It was to be in force for ten months. A similar act was passed in 1758.<sup>1</sup> The clergy fought these acts in every way possible, demanding that their salaries be paid in tobacco, which at that time was worth much more than two pence a pound. Without going into the merits of the controversy, it is sufficient for our present purposes to call attention to its results. These were the further alienation of the people from the Established Church, and the increase of the Dissenters in number and influence.

The statement, then, seems warranted that during the French and Indian War one phase of the struggle between the Dissenters and the Established Church came to an end. After this, indeed, the General Court still insisted upon keeping the matter of licensing ministers and meeting-houses under its own supervision, but the spirit in which the law was executed was changed. Applicants for licenses could now go to the General Court with reasonable assurance that their requests would be granted.<sup>2</sup>

SUMMARY.—The Established Church of Virginia, as a result of circumstances as well as of the conscious effort of its

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<sup>1</sup> Campbell, *Hist. of Va.* p. 507 ff.

<sup>2</sup> Many of the early Separate Baptist ministers who preached in Virginia claimed the right to do so when and where they pleased. They met with much opposition from local magistrates, who looked upon them as disturbers of the peace; and many of them were imprisoned under peace warrants. But whenever they applied to the General Court for licenses, they seem to have obtained them. (*Semple's Baptists in Virginia*, p. 24.) The attitude of the government toward them may be seen in a letter written July 16, 1768, by Deputy Governor Blair to the king's attorney in Spotsylvania county (given in *Semple's Baptists in Virginia*, p. 16). The following sentence occurs: "The Act of Toleration (it being found by experience that persecuting dissenters increases their number) has given them a right to apply, in a proper manner, for licensed houses for the worship of God according to their consciences; and I persuade myself the gentlemen will quietly overlook their meetings till the Court." The contest of the Baptists with the authorities of Virginia has not been discussed in the present paper, since their claims seem to mark an advance in the general fight against the Established Church. With the Baptists the struggle becomes one for religious freedom rather than one for toleration.

adherents, differed widely from the mother Church of England, in that its government was not central but local. This difference, taken together with the fact that Virginia's population contained already several elements not in complete harmony with the Church, explains why the severe laws with which the Quakers and other Dissenters were promptly met upon their appearance in Virginia, were unequally enforced in different portions of the colony. Contrary, too, to the spirit of the persecuting laws were the instructions from the crown to the royal Governors, and the desire on the part of the inhabitants of the colony for an increase in its population. Thus the extreme provisions of the laws soon became inoperative. However, with the exception of the Quakers in the southeastern part of the colony, who profited by the attitude of the Puritan element there toward the government, Dissenters were for many years not numerous in Virginia. They continued to be of slight importance even after the incorporation into the laws of the colony in 1698 of the English Toleration Act of 1689.

The cause of the later increase in the numbers of Dissenters is to be found primarily in the policy of the government with reference to the strengthening of the frontiers. The first illustration of this policy is seen in the location in 1700 of the Huguenots at Manakin Town; the next, in the location in 1713 of the Germans at Germanna. The practice adopted in the case of the French and of the Germans was afterwards extended to regular Dissenters, when in 1732 the settlement of the Shenandoah Valley was begun by Germans and the Scotch-Irish from Pennsylvania.

These settlers on the frontiers, both east and west of the Blue Ridge mountains, were consistently allowed rights of toleration. But when Dissent began to spread in Hanover and adjacent counties, the inhabitants of which were originally adherents of the Established Church, the government in alarm endeavored to suppress it. In the contest thus arising, the claim of the Dissenters was that they should be accorded the privileges enjoyed by their brethren in England,

where the licensing of ministers and the registering of meeting-houses lay with local courts, and a minister's license made it legal for him to preach in any registered house whatever. On the other hand, the General Court took the ground that only so much of the English law on the subject applied to Virginia as had been incorporated into her statutes, and that in practice this must be brought into harmony with laws of Virginia already existing. According to this construction, the General Court kept in its own hands the licensing of ministers and meeting-houses, and confined each minister to the specified places for which he had been granted license. It claimed also the right to decide how many meeting-houses each minister should be allowed. But during the French and Indian War, when the government was straining every nerve to present a solid front to the enemy, and when Churchmen and Dissenters were drawn closer together by common danger, there was a change in the spirit shown toward the latter. At the same time, the influence of the clergy, owing to the unpopularity of their struggle in reference to the payment of their salaries, steadily waned. Under these circumstances, the Dissenters began to enjoy the rights which they had claimed, modified, however, by the construction still put upon the law by the General Court, which continued to reserve to itself the consideration of all questions in regard to licenses. The Dissenters had not gained their contention that the county courts should have jurisdiction in such cases, but in other respects the English construction of the law now prevailed.

Although much remained to be done before the day of complete religious freedom, the struggle for mere toleration was now at an end.



**V-VI-VII**

**THE CAROLINA PIRATES AND COLONIAL  
COMMERCE, 1670-1740**





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE  
HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

V-VI-VII

THE CAROLINA PIRATES AND COLONIAL  
COMMERCE, 1670-1740

BY

SHIRLEY CARTER HUGHSON

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## INTRODUCTION.<sup>1</sup>

In the present work the author will attempt to present the results of a study of the pirates of the coasts of the two Carolinas during the seventeenth and eighteenth centuries. The purpose will be to show how they arose; how they were regarded by the colonists and the English authorities respectively; how they affected the life and commerce of those parts of the new world they frequented; and, finally, how they were exterminated.

From time immemorial the "odious and horrid" crime of piracy has been the subject of special and most severe laws in almost every country of Europe, and the people of England, always distinguished for their love of law and order, have from the earliest period regarded it with peculiar abhorrence. The ancient law of the realm dealt with it in a very specific manner. The pirate was declared a "hostis humani generis," and by the English law, both common and statutory, he was accorded no rights which any one was bound to respect. He was a common enemy to mankind, with whom neither faith nor oath was to be kept. "As therefore," says the old commentator, "he has renounced all the benefits of society and government, and has

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<sup>1</sup> The author desires to thank the following gentlemen for advice and assistance in the preparation of this study: Professor H. B. Adams, Johns Hopkins University; Dr. Edward Eggleston, New York; Professor W. P. Trent, University of the South; Dr. S. B. Weeks, of Trinity College, N. C.; Mr. James Sprunt, British Vice-Consul, Wilmington, N. C.; General Edward McCrady, Ex-Mayor W. A. Courtenay, Mr. Daniel Ravenel, Major E. Willis, Mr. Yates Snowden, Mr. Julius Seabrook, all of Charleston; Mr. Henry L. Barker, Oakley, S. C. Also to Miss Helen V. Banskett for faithful researches made in the records in the Secretary of State's office, Columbia, S. C.

reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him, and every community hath a right by the rule of self-defense to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property."<sup>1</sup> Further than this, no person charged with piracy could claim the benefit of clergy or the right of sanctuary, and if the crime was attempted on the ocean, and the pirates be overcome, the captors were at liberty to hang them from the yard-arm "without any solemnity of condemnation." In all declarations of general pardon it was understood, even though no clause to that effect was inserted, that pirates were excepted. It was usually customary, however, to enter a clause stating this exception specifically.

According to the very early English law, piracy in a subject was a species of petty treason, but by an act of 25 Edward III., c. 2, it was made a felony, and since that time has always been classed as such.

It was on the common law, and numerous early English acts, that judicial proceedings against pirates were based, until by a statute of 28 Henry VIII. the law was fully set forth in an extensive act of Parliament, which defined clearly the crime of piracy with its numerous modifications, and appointed the method of trial, execution of sentence, etc. Up to this time all pirates had been tried in England before the Lord Admiral, but the preamble of this act set forth the difficulty of bringing prisoners from remote parts, and provincial Vice-Admiralty Courts, by which all cases under the jurisdiction of the Admiral could be tried, were established. It has been under this act, or modifications of it, that all subsequent trials have been held.

Some of the refinements of the pirate law which arose later were very remarkable and are worthy of notice. For instance, if an Englishman was captured from an alien war

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<sup>1</sup> Blackstone, Book IV., Chap. 5.

vessel while England was engaged in war against the flag under which she was sailing, the prisoner was deemed a pirate and dealt with accordingly. Again, if an alien was taken in the act of serving on an English pirate against English shipping, and his country chanced to be at war with England at the time, the prisoner was adjudged to be engaged in legitimate hostilities and could be dealt with only by the military authorities.

At the time of the founding of the American colonies the English mind was absolutely set against piracy, and the severity of the law was founded in the same principle that underlies the severity of the law in many parts of the United States against larceny from the freehold. So peremptorily were cases disposed of that few defendants ever escaped the extreme penalty. If we can form any judgment from the reports of trials which have been handed down, in a great majority of cases, as in witchcraft, very little more than the mere preferment of the charge was needed to insure conviction. One of the most interesting phases we have to trace is how this sentiment changed, and how from abhorring piracy the English in America grew not only to tolerate but to encourage it.

The subject of piracy on the Carolina coasts divides itself into two periods: the first, from the founding of the colonies, 1660-70, to the end of the seventeenth century; and the second, from 1713 to 1719, or, to measure it by events, from the Peace of Utrecht, which threw many American privateers out of employment, to the downfall of the Proprietary government in South Carolina, when the colonial affairs were taken from the control of a trade corporation and passed into the strong hands of the king's officers.

In studying this or any other subject relating to the two Carolinas one is liable to constant confusion owing to the indiscriminate use of the name Carolina by the old authorities. It is used by nearly all the writers without any definition or qualification, and frequently when an occurrence is narrated it is well-nigh impossible to know to which of the

later divisions of the province it should be referred. In the present work the author has had this difficulty to contend with at every step, but he trusts that the careful verification of authorities he has made in every instance will save him from this rock upon which so many excellent historians have been stranded.

# THE CAROLINA PIRATES AND COLONIAL COMMERCE, 1670-1740.

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## CHAPTER I.

The appearance of pirates on the Carolina coast was coeval with the earliest settlements in the New World. The first accounts date back to the year 1565, soon after the French colony under Ribault was planted near the site of the present town of Port Royal. In 1564 the French king, learning of the impoverished condition of the first settlement, sent out three relief ships under Laudonnière, who carried with him adventurers from every part of France, who were induced to join the expedition by the accounts which were circulated of the marvellous wealth of the country. Arriving in Carolina, they found that the reports had been greatly exaggerated, and, discouraged at the prospect, they determined to try their fortunes by cruising as pirates in the West Indies. Laudonnière refused to give them passports, whereupon a large number mutinied and forced him by imprisonment to comply with their demands. They then stole a vessel and set sail for the Spanish Main. At first they met with much success, and finally grew so bold as to run into Jamaica, terrorize the entire island, and round up the escapee by holding the Spanish governor a prisoner on board their ship. Having been defeated in an engagement with the Spaniards, however, the pilot, who had been forced to join them, steered back to Carolina, where Laudonnière, who had in the meantime strengthened himself in the colony, had them arrested and condemned to execution for piracy as an "example to posterity." A strong address was delivered to

the settlers on the enormity of the crime, after which the sentence was executed.<sup>1</sup> The year following this occurrence the French colony was wiped out of existence by the Spaniards, and it was more than a hundred years before any further settlements were attempted in Carolina.

This instance was but an isolated one, however, and can scarcely be considered as a part of the piracies which enter so largely into the history of the early American colonies. At this time none of the English colonies of North America had been planted, and it was not until the founding of these that the famous piracies of the 17th and 18th centuries began. From them the old buccaneers of the West Indies drew many of their most desperate companions, who in after-years assumed the leadership of expeditions never surpassed in the annals of piracy. Very many of these early English settlers were adventurers,—not in the then honorable meaning of the term, but in the strictest latter-day disreputable sense. The countries of Europe, when anxious to rid themselves of turbulent elements, offered special inducements to the objectionable individuals to emigrate. By England particularly was this custom practiced, and the better classes in the colonies frequently complained of the unloading of the refuse population of the mother country on their shores. One of the best accounts yet given of the colonization methods of the seventeenth century is by the historian Doyle. "It became a trade," he says, "to furnish the plantations with servile labor drawn from the offscourings of the mother-country." So far had this policy been adopted by the English government, that in 1661 "a committee was appointed to consider the best means of furnishing labor to the Plantations by authorizing contractors to transport criminals, beggars, and vagrants." "Runaway apprentices," continues Doyle, "faithless husbands and

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<sup>1</sup> Carroll's Collections, Vol. I., pp. liii-liv.



wives, fugitive thieves and murderers were thus enabled to escape beyond the reach of civil or criminal justice."<sup>1</sup>

But not only were the lowest criminal classes induced to emigrate, but on more than one occasion was it attempted to settle objectionable statesmen in the Plantations, while others, fearing to lose their heads at home, escaped the vengeance of the authorities by taking up a residence in some distant settlement. No less distinguished a personage than the great Earl of Shaftesbury, one of the original Lords Proprietors of Carolina, at one time sought to escape a threatened prosecution for his alleged treasonable leanings by fleeing to that colony.<sup>2</sup> It is thus seen that a large proportion of the first settlers of many parts of America were banished criminals of the lowest class, and in numbers of cases the leaders, while not really depraved characters, were at least agitators of a type whose presence would by no means conduce to the political health of any community. So anxious were the Proprietors of the various colonies to have their plantations settled that they adopted all kinds of schemes to secure this end.<sup>3</sup> In Carolina large bounties of land were offered to every settler who would bring with him a certain number of servants. It was easy enough for a new-comer to attach to himself any number of low characters, enter them as his servants, receive the broad domain to which he was entitled, and then either turn the people loose on the country, or else attempt to settle them as "lectmen" in accordance with the terms of the laws of the colony.<sup>4</sup> It was never practicable to enforce these terms of vassalage, and these rogues knew well enough what their freedom

<sup>1</sup> Doyle's *English Colonies in America*, Vol. I., pp. 383-84 (American edition). Also see Hewat's *South Carolina in Carroll*, Vol. I., p. 54 *et seq.* Also memorandum in S. C. Hist. Society Coll., Vol. I., p. 206, for notice of female convicts. Also Hawks' *N. C.*, Vol. 2, p. 230 *et seq.*

<sup>2</sup> Cook's *Hist. of Party*, Vol. I., p. 210.

<sup>3</sup> In 2 S. C. Stats., p. 124, is published an act offering special inducements to delinquent French and English debtors to settle in South Carolina. The date of its passage is December 5th, 1696.

<sup>4</sup> See *Fundamental Constitutions of Carolina*.

would be in a new, wild country like America. The form of government in many of the colonies, and especially in Carolina under the Fundamental Constitutions of the idealistic John Locke, was purely experimental, and as is the case in all new countries, the law was but slightly regarded because the power to enforce it was weak. Considering all these circumstances it is not surprising that bold, bad men with criminal propensities, if not genuine outlaws, should flock to the American Plantations as a field in which they could indulge their evil natures with comparatively little interruption. This was the class that fostered the spirit that needed but an opportunity to break out into every kind of crime that occasion might suggest. And opportunity was not wanting from the very moment they landed on the shores of the New World.

It is safe to say that when the English, under the charter of Charles II., settled Carolina, the pirates of the Spanish Main had for many years been occupying the coast at their own pleasure. Indented as it was by numerous harbors and inlets, it afforded them a safe refuge when pursued by enemies, and was a most available place for refitting and repairing after a cruise. Here, too, they could bring their prizes, and, if ancient tradition be true, bury their treasure. The coast country was a wilderness inhabited only by scattered tribes of savages, and once within the headlands of the spacious harbors they were protected from interference and could plot their nefarious schemes at their leisure.

Sir John Yeamans, of the Barbadoes, made a settlement on the Cape Fear river in 1664, and Governor Sayle arrived with his commission from the Lords Proprietors in 1670, and made his first landing at Port Royal, near the site of the French colony of the previous century. We have but few records of the personnel of these pioneer parties, but there can scarcely be any doubt that they included many persons who were not loth to make friends with the pirates. Nor is it to be supposed that the pirates themselves were anything but pleased at the settlement of the coast. It

simply afforded them new and convenient rendezvous, and they had nothing to fear from the authority of the Governors or their officers. Powerful as they were upon the sea, and carrying, in many cases, commissions from the English king, it was not to be expected that they would stand in very great awe of the young and struggling colonies, especially when, as has been shown, the men who were to constitute a large part of the settlements were in a general way in sympathy with the buccaneers in their criminal practices. The pirate chiefs simply looked upon the settlements as communities with which they could carry on a profitable trade, and from which they could, in many instances, recruit their forces. If the suspicions of the colonial governments were aroused, no proof of crime was forthcoming, and the pirates could still come and go among the people without fear of hindrance.

The most powerful of these pirates were men who had entered upon their careers with special commissions from the English government.<sup>1</sup> Ever since before Blake's great victory over the Spaniards at Santa Cruz in 1657, the American seas were covered with privateers commissioned to prey upon the commerce of Spain. Making the English colonies their headquarters, these bold adventurers would make sudden dashes on the coasts of the Spanish provinces, seize any vessels sailing under the colors of his Catholic Majesty, and return with their rich plunder long before any steps could be taken to avenge their depredations. For many years scarcely a month passed without seeing these licensed freebooters sail into Carolina, their vessels laden with the spoils of their latest expedition. Not infrequently they would meet with rich prizes, ships of treasure and plate, and on coming into the colony would scatter their gold and silver about with so generous a hand that their appearance soon came to be welcomed by the trading classes; and by means of their money they ingratiated themselves not only

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<sup>1</sup> See Chalmers' *Polit. Annals*, Art. Carolina, p. 546.

with the people, but with the highest officials of the government. For many years after the founding of Carolina most of the currency in circulation was the gold and silver pieces brought in by the pirates and privateers from their cruises in the West Indian waters.<sup>1</sup> It is therefore not surprising that the colonists should have entertained sentiments of friendship for them, and the moral tone of the mass of the inhabitants was not so high that they were particularly shocked at certain rumors which obtained that the strangers did not always secure their rich prizes in a manner that could bear the light of an official inquiry.

When we consider the relations then existing between Spain and England in the New World, it is impossible to look upon this toleration and encouragement wholly in the light of a crime. The Spaniards of Havanna and Florida were in a constant state of activity with a view to annihilating the English settlements of North America, and the only safety the colonies had was in overawing their enemies and making them feel the weight of their enmity on every possible occasion. This they were enabled to do through the privateers fitted from Charles Town, and the constant presence of these fearless free-lances on the coast preserved Carolina from frequent and disastrous invasion from the South.

In those rude days the line between privateering and pirating was not very strongly marked, and when a few years after the settlement of Carolina, peace was made with Spain by England, these bold rovers, who had done so much for the Crown in time of war, had no idea of permitting their occupation to be taken from them by so small a thing as a

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<sup>1</sup> Hewat in Carroll, Vol. I., p. 172. The copper elephant coin, struck in 1694, bearing the legend "God save Carolina and the Lords Proprietors," was probably only a medal, and was not known to be in actual circulation though said to be a half-penny. No inscription on it indicated any special value. This condition noted as existing in Carolina also obtained in New England at an earlier period. See Weeden's Economic and Social Hist. of New England, p. 151.

treaty patched up between the contending powers. The sea was wide, and if they should plunder a ship or two in the course of a voyage, and maroon the crews on a desert island, who would be any the wiser? The English authorities evidently were little concerned about their depredations, as their commissions were not even revoked until 1672, and the Carolinians with whom they spent much of their now ill-got gold did not consider it any of their business how their adventurous friends employed themselves on their long, mysterious cruises. They paid their scores like honest fellows, and paid them in broad gold pieces at that; they interfered with no man, and conducted themselves in as respectable a manner as any sailor on shore-leave was expected to do; and so neither peace officer nor public deemed it their duty to inquire too closely into the conduct of their visitors while they were on the high seas. True, their vessels were never fitted as the colonists were accustomed to seeing merchantmen fitted; but that, again, was the business of nobody but the skipper and his crew, and if he chose to go to sea constantly without a cargo, and seldom troubled himself about securing passports or clearance papers, that was his own concern, and the king had no officer in Carolina at that time who thought it his duty to inquire into these evident irregularities.<sup>1</sup>

There was nothing that contributed so much to the fostering of piracy in the western world as the operations of the English Navigation laws. Did time permit, it would be most interesting to pause and review in detail the history of these famous acts, but we must confine ourselves to the effect they had on the commerce of America, and to how they were instrumental in vitiating the entire business system of the colonies. The first glimpses we have of them are found in 1381 and 1390, during the reign of Richard II. In 1485, under Henry VII., we again find the policy showing itself in legislation, but its growth was slow, and it was not

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<sup>1</sup> Charles Town had no customs officer until 1685.

until 1651 that it was fully matured and set forth in an act of the Long Parliament, under the direction of Cromwell.<sup>1</sup> The confusion which followed upon the death of the Protector, some years later, enabled the colonists to ignore them with comparative impunity, but upon the Restoration, Charles II. had them re-enacted and enforced with much severity.<sup>2</sup> A further enactment in 1663 imposed still more rigorous restrictions,<sup>3</sup> and in 1672 intercolonial trade was also checked by heavy tariffs.<sup>4</sup>

These Navigation Acts have from time to time been the subject of commendation by numerous English economic and historical writers, especially those of the protection school of the first half of the present century. They have been boastingly styled the "*Charta Maritima*," the "*palladium*"<sup>5</sup> of England and of English commerce. Even Adam Smith, while denying their economic efficacy, considering the relations then existing between England and Holland, justified them on the plea of the necessity for national defense,<sup>6</sup> and Sir Archibald Alison, fortifying himself behind a dishonest quotation from Smith, has celebrated in glowing periods "the pitch of grandeur unknown in any other age or country" to which their operations raised England.<sup>7</sup> But strange as it may seem, none of these writers, though dealing with a question of colonial policy, in their survey of the subject looked beyond the southern half of the island of Great Britain. In this they only followed the example of the framers of the acts, and no thought was given to their possible effect in retarding the commercial growth and prosperity of those vast undeveloped lands which were destined in time to outstrip the mother-country and become the

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<sup>1</sup> See Waterston's *Cyclopaedia of Commerce* (1863), p. 488.

<sup>2</sup> 13 Car. II., Ch. 14.

<sup>3</sup> 15 Car. II., Ch. 17.

<sup>4</sup> 25 Car. II., Ch. 6. See Doyle, *English in America*, Va., Carolinas, etc., p. 233.

<sup>5</sup> *Quarterly Review*, Vol. 28 (1823), p. 431.

<sup>6</sup> *Wealth of Nations*, Book IV., Chap. II.

<sup>7</sup> *Essays*, Vol. I., p. 476.

"Greater Britain" of later centuries. If they were the "Charta Maritima" of England, they were indeed the "Charta Pirata" of England's American colonies.<sup>1</sup>

To repeat our proposition, these laws acted as the most potent force in causing the toleration of the pirates in America. When the colonists found that they could neither buy nor sell save in an English market, at prices arbitrarily fixed by English merchants, they were quite willing to tolerate the lawless traders who could afford to sell the products of the world's markets at the lowest prices, since they cost them nothing more than a few hard blows which they enjoyed rather than considered a hardship. It paid the colonists to incur the risk of losing their outward-bound cargoes, which were never during this period of any very great value, when by this toleration they were enabled to buy in the cheapest market the world had ever known.

But the friendship of the Carolinians with the pirates is scarcely to be wondered at when we remember that in this they had no less distinguished an exemplar than King Charles himself. Some years previous he had knighted Henry Morgan and commissioned him Governor of Jamaica in recognition of certain exploits at Panama which were of a purely piratical nature, and his general connivance at their crimes was what had given the pirates their strength in the West Indies.<sup>2</sup>

This state of affairs continued for some time, until, growing bolder, the pirates began to extend their operations. They no longer confined their depredations to the commerce of his Catholic Majesty, but if they chanced to meet an English vessel they did not hesitate to order her to heave to and strike her colors, and many a time was the ensign of St. George lowered before the Black Flag.

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<sup>1</sup> See Winsor, III., 150 for effect of the Acts on Virginia. Berkeley went to England from Virginia in order to protest against them.

<sup>2</sup> Rivers' Early Hist. of S. C., p. 146. Also Hewat in Carroll, Vol. I., p. 86.

Almost immediately after the landing of Sayle the seat of his colony was removed from Port Royal harbor to the original site of Charles Town at Albemarle Point, on the west bank of the Ashley river, a short distance above the site of the present city of Charleston. It proving inconvenient for shipping, however, the people repaired to Oyster Point under Governor West, where the present city was founded in 1680.<sup>1</sup> Shortly after the first settlement, the Cape Fear colony was abandoned, and Charles Town became the chief seat of government for the entire province. It grew in commercial importance, and the toleration of the pirates became a serious annoyance to the English ship-owners who controlled most of the trade. Masters came into London with grievous tales of outrages suffered at the hands of pirates fitted out from Carolina, and it was not long before complaints were heard in the counting-houses of the provincial capital itself. This was, of course, more serious, but ship-owners in Carolina were few, and the pirates still continued to spend their money with a lavish hand, so the colonists took little notice of these murmurings, although of late they had become alarmingly frequent.

By the beginning of the year 1684, however, the complaints began to assume some definite shape and to be heard from persons whose position and influence commanded attention. Sir Thomas Lynch, Governor of Jamaica, filed an information with the Lords of the Committee for Trade and Plantations regarding the depredations of the pirates, and in February of this year the attention of the government was directed to "the great damage that does arise in his Majesty's service by harboring and encouraging pirates in Carolina."<sup>2</sup> As soon as the subject was considered by the English authorities, the Jamaica law against piracy was, by order of the king, sent to Carolina, with instructions that it

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<sup>1</sup> The site of the Ashley River settlement is still pointed out some miles from Charleston. See note in Carroll, Vol. I., p. 49.

<sup>2</sup> N. C. Col. Rec., Vol. I., p. 347.



be promulgated as a statute of the province.<sup>1</sup> The government also complained to the Lords Proprietors, which called forth a reply from Lord Craven, the Palatine, in which he resented the charges made by Lynch in quite a spirited tone. He knew, he said, of no flagrant cases, such as had been charged. One pirate had come into Carolina some time before, but had been convicted, with two of his crew, and hanged in chains at the entrance of the port, "and there hang to this day for an example to others." He had had the Jamaica law promulgated, however, and hoped that there would be no further cause for complaint.<sup>2</sup>

Although the Proprietors had this act promulgated, it is very questionable if the king had the right to issue such an order. Under the charter, issued by his own hand, the Proprietors were given the right to make laws for the Province "by and with the advice, assent, and approbation of the free-men of the said province,"<sup>3</sup> provided only "that the said laws be consonant to reason, and as near as may be conveniently agreeable to the laws and customs of this our realm of England";<sup>4</sup> and as long as this condition was complied with, any dictation from England might have been resented with much justice. Some thirty years later the colonists objected strenuously, and to much effect, to the annulment of some of their acts by the Lords Proprietors,<sup>5</sup> who were their immediate rulers, and they could with much more color of justice have resented the interference of the

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<sup>1</sup> N. C. Col. Rec., Vol. I., p. 347-48. See also S. C. Hist. Soc. Coll., Vol. I., p. 91. The same order was sent to all the other English colonies in North America at the same time. See N. C. Col. Rec., as above. Lynch's complaint did not apply to Carolina alone, although it was the only colony he mentioned by name.

<sup>2</sup> N. C. Col. Rec., Vol. I., p. 348.

<sup>3</sup> See the second charter, 1 S. C. Stats., p. 33.

<sup>4</sup> *Ibid.*, p. 34.

<sup>5</sup> For an exposition of the rights of the people against the Proprietors, see Doyle, Vol. I., p. 330.

king. Under the proper construction of the charter,<sup>1</sup> which construction Charles virtually acknowledged in making his order, no statute, English or otherwise, was of force in Carolina until passed by the Assembly, and it is clear that the right to make their own laws would have been practically abrogated had the colonists been compelled to receive them ready-made from the Crown. And had they refused to obey the order the king could have had no redress save by *quo warranto* proceedings to test the question of the violation of the charter, or by a writ of *scire facias* to recall it.<sup>2</sup> The method of enacting laws in the early days of the colony is given by a contemporary writer<sup>3</sup> as follows: "The General Assembly first peruse all English Acts of Parliament, draw up an account of as many intire ones, and parts of others as are fit for this Province, and by an Act of Assembly mentioning these Acts, they put them in force." According to the same authority the common law of England was not in force in Carolina until so declared by statute. It is certain that the Great Charter of 9 Henry III. was not binding in the Province until so declared in 1712.<sup>4</sup>

No question was raised, however, as to the legality of the king's action, and the law, which was destined to become a dead-letter immediately, was published in the Province. While there is no way of ascertaining positively, it is reasonably certain that the statute against privateers and pirates, enacted at the legislative session of November, 1685, was in

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<sup>1</sup> "The charter reserved to the King only allegiance and sovereignty; in all other respects the Proprietors were absolute lords, with no other service or duty to their monarch than the annual payment of a trifling sum of money; or in case gold or silver should be found, a fourth part thereof." W. J. Rivers in Winsor's *Narrative and Critical History of America*, Vol. V., Art. "The Carolinas," p. 290.

<sup>2</sup> See Dalcho's *Church History*, p. 69, for case of the Church acts. Also Bancroft I., p. 402 *et seq.*, for similar proceedings in the Mass. case.

<sup>3</sup> A Letter from S. C. written by a Swiss gentleman in 1710, p. 24 (London ed. 1732).

<sup>4</sup> 2 S. C. Stats., p. 403.

pursuance of this order of King Charles.<sup>1</sup> This act is interesting on account of the naïve manner in which the Solons of the time disclaimed the guilt of the province and sought to shift it to other shoulders. "Whereas," they said, "not only against such treaties of peace made by his Majestie with his Allies, but alsoe contrary to his Majestie's Royal Proclamation, severall of his subjects have, and do continually goe from other English Colonies, and may hereafter from this Colony, into the service of foreign princes, and saile under their commissions, contrary to their duty and good allegiance, and by faire means cannot be restrained from soe doing, be it therefore enacted," etc. Not only does this act refer to privateers, however, but, in more direct obedience to the royal mandate, clauses were inserted looking to the immediate suppression of the kindred and more heinous crime of piracy. We have no records of any court proceedings against offenders prior to this time, but section IV. of this act would seem to indicate that there had been such, as all such prior proceedings were now "ratified, confirmed and adjudged lawful."

Having obeyed the letter of his Majesty's commands like faithful subjects, and thus averting further suspicion, the Carolinians were in a better position to encourage and assist their buccaneering patrons than before. Few convictions, if any, were obtained, and the pirates plied their nefarious trade with equal security as formerly. During the war between France and Spain in 1684 privateers were sent out from Carolina in a most public manner, and it was an open secret that their commissions, illegal as they were, were but cloaks for the most disgraceful piracies.<sup>2</sup> Learning of these circumstances, Charles ordered that no more commissions

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<sup>1</sup> 2 S. C. Stats., p. 7. This act was passed after Charles' death, but that circumstance does not make it less probable that it was in accordance with his orders. A full description of the Jamaica Act is given in N. J. Archives, 1st Series, Vol. II., p. 281 *et seq.*, and its terms correspond generally to the terms of this statute.

<sup>2</sup> Rivers, p. 146.

should be issued. His commands were but little regarded, however, and the following year, when James II. mounted the throne, he found the commerce of the New World suffering greatly from the pirates, who had by this time established thriving headquarters in the West Indies and the more unsettled parts of the Carolina coast.

One of the few redeeming features of James' brief and turbulent reign was his conduct of naval affairs, and this difficulty which confronted him on his accession he prided himself he could speedily overcome. One of his earliest acts was to venture on the same doubtful ground occupied by Charles, and order a law for the suppression of piracy to be enacted by the Carolina Assembly. The people again proved their loyalty, and the act was entered among the statutes of the Province. It was probably in pursuance of this order that the act "For the Suppressing and Punishing Privateers and Pirattes," etc., was passed by the Assembly in February, 1687.<sup>1</sup> This statute was in large part a re-enactment of that of November, 1685, although its terms applied much more particularly to actual pirates, and provided somewhat more explicitly for the punishment of those who might tolerate or connive at, infractions of the law.

But James had a severer task before him than he had anticipated. The simple passage of an act by a subservient Assembly was not sufficient to wipe out an evil which had been growing for years, and one that was probably very profitable to those into whose hands the duty of extirpating it was reposed. Although the buccaneers no longer sacked the cities of the Spanish Main, or held high carnival in the security of their Jamaican retreat, their strength had by no means been broken, and they were yet so powerful as to be able to make terms—tacit though they were—with the highest officials of the provincial government. In April, 1684, Sir Richard Kyrle, an Irish nobleman, was commis-

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<sup>1</sup> 2 S. C. Stat., p. 25.

sioned Governor of Carolina.<sup>1</sup> He died very soon after reaching the Province, and Robert Quarry, the Secretary, assumed control of the government without authority from the Proprietors.<sup>2</sup> Quarry was a man of considerable distinction, and had held numerous offices of trust in the colony. A few months before, it had been recommended that "as the governor will not in all probability always reside in Charles Town, which is so near the sea as to be in danger from a sudden invasion of pirates," Governor Kyrle should "commissionate a particular governor for Charles Town who may act in his absence," and Quarry was suggested as a suitable person for this office.<sup>3</sup> It was probably this recommendation that made Quarry feel justified in assuming control when Kyrle died, but when he found himself at the head of affairs his cupidity proved stronger than his honesty. So flagrant was his encouragement of pirates that within two months he was removed from office, and also deprived of his regular position as Secretary.<sup>4</sup> It is evident, however, that the tribunal of public opinion did not adjudge him guilty of any great moral crime, as he remained in the Province and was for years afterwards continued in positions of responsibility.<sup>5</sup>

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. I., p. 111.

<sup>2</sup> Props. to Sothell, Rivers, p. 417.

<sup>3</sup> S. C. Hist. Soc. Coll., Vol. I., p. 111.

<sup>4</sup> Props. to Sothell, Rivers, p. 147.

<sup>5</sup> Quarry was one of the most remarkable men in the American colonies during this period, and despite the disgrace which attached to him in consequence of this affair, seems to have maintained a high position until his death. His name appears signed as one of the Council to the South Carolina Acts as late as Nov. 23rd, 1685, and he was Sheriff of Berkeley County just before Ludwell's accession in 1691 (see N. C. Col. Rec., Vol. I., p. 382). Despite the continued opposition of the Proprietors, we find him Vice-Admiral of Carolina in 1701 (see S. C. Hist. Soc. Coll., Vol. II., p. 205). A few years later he went north and succeeded Edward Randolph as Surveyor-General of his Majesty's customs in America. Later he was appointed Admiralty Judge for New York and Pennsylvania, and was member of the Councils of five of the Northern

The attitude of the Carolinians toward the pirates not only reflected infamy on the Province—which, however, they did not seem to feel very keenly—but it was not long before they began to reap the fruit of their disgraceful connections. There had always been a very bitter feeling existing between the colony at Charles Town and the Spaniards at St. Augustine. It was an article of the seventeenth-century Englishman's religious faith to hate a Spaniard as he would the Evil One himself; and the Spaniards not only returned the detestation with interest, but in the present case it was aggravated by the fact that, despite the terms of the treaty of Madrid of 1670, which secured to England all her American possessions against any previous claims Spain may have had,<sup>1</sup> they considered the colonists at Charles Town as intruders on their territory, and chafed continually under their inability to exterminate them as they had done the French settlers of the previous century. The pirates, too, were the open enemies of the Spaniards, and it was but natural that they should have viewed with a redoubled hatred a people who encouraged and fostered the outlaws who had for so many decades made the sea absolutely unsafe for their commerce. Their resentment had been smouldering for a long time, and finally towards the end of the year 1686 it broke out in open hostilities. Three galleys from St. Augustine landed at Edisto, several leagues below Charles Town, and laid waste the plantations in the vicinity, including

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colonies at one time. His reports to the English government, which were many and voluminous, indicate that he was a special agent of the crown to report from time to time on the condition of the colonies (see N. J. Archives, 1st Series, Vol. II., p. 280). Despite the reproach of his early life, he seems to have performed his duty well, winning the high esteem of both the colonists and the home authorities. This makes it seem possible that his career in Carolina was not so dark as the documents of the time indicate. He died about 1712-13 (see N. J. Archives, 1st Series, Vol. IV., p. 175).

<sup>1</sup> Rivers, p. 82. The Spaniards knew Charles Town harbor as St. George's Bay.

those of Governor Morton and Secretary Paul Grimball, and killed the former's brother-in-law. They then pushed on to Port Royal, and completely destroyed the Scotch colony there, and retired before a force could be raised to oppose them.<sup>1</sup> The colonists were overwhelmed with anger and indignation at the barbarity of this sudden invasion, and began immediate preparations to avenge it by a descent upon St. Augustine. An expedition was organized and an armament about to sail, when James Colleton, who had been commissioned Governor the previous August, arrived from the Barbadoes. He immediately assumed the reins of government, and ordered the expedition to disband. Some of the leaders demurred, whereupon he threatened to hang every man who would not instantly come on shore and abandon his purpose. These peremptory measures, although humiliating to the settlers, nipped in the bud a war which would have been long and bloody and for which the colony was by no means prepared. The Carolinians considered the abandonment of the enterprise as a stain upon English honor, but they were given little satisfaction from the Proprietors. Their complaints only elicited the reply that they could expect nothing but that the Spaniards would retaliate on them for harboring and assisting the lawless rovers who maintained themselves by preying on the commerce of the Spanish settlements.<sup>2</sup>

Colleton commenced his administration during a turbulent era. For a long time the pirates had been permitted free access to Charles Town, and Joseph Morton, who had succeeded Quarry, had even given formal permission to two buccaneers to bring some Spanish prizes into the

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<sup>1</sup> By some strange error, Doyle has antedated this invasion by six years (see p. 358). This error is remarkable, considering how much he relies on Rivers. Mr. Thwaites in his recent work on the colonies in the Epochs of Am. History series makes the same mistake.

<sup>2</sup> Carolina Entry Book, Vol. I., p. 106, quoted in Chalmers, *Polit. Annals*, p. 547; also Rivers, p. 145.

harbor, and had also, with the sanction of the Council, allowed the infamous Morgan to come into the province.<sup>1</sup>

One of the first acts of Colleton's administration was the expulsion of John Boon from the Council "for holding correspondence with pirates."<sup>2</sup> He had special instructions regarding the suppression of piracy, and in every way he did his best to stamp out the evil, but only with partial success. Finally the situation became so serious that the home government was compelled to take some decisive action. Accordingly in 1687 King James commissioned Sir Robert Holmes to proceed to the West Indies with a fleet and to make short work of all the pirates in those and adjacent waters. At the same time orders went from Whitehall to Carolina to seize all pirates who came into the province and hold them at the pleasure of the king, and certain unwarrantable practices, which had been used to facilitate their acquittal, were ordered to be suppressed.<sup>3</sup> A copy of the commission issued to Holmes was also transmitted by Lords Craven and Carteret, two of the Proprietors, with instructions to assist in every way in extirpating the outlaws.<sup>4</sup>

Just what assistance the Carolinians gave Holmes is not known, but it is not probable that they troubled themselves to detain many prisoners at his Majesty's pleasure. They complied with the instructions, however, and enacted a law not only against all pirates, but against all suspects, and provided for the issuance of commissions for the trial of offenders.<sup>5</sup> Holmes was far from making a permanent success of his undertaking, but his presence on the North American coast, and the apparent determination of the king

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<sup>1</sup> Rivers, p. 147.

<sup>2</sup> See instructions from Props., S. C. Hist. Soc. Coll., Vol. I., p. 118.

<sup>3</sup> S. C. Hist. Soc. Coll., Vol. I., p. 120.

<sup>4</sup> N. C. Rec., Vol. I., 354. Rivers, p. 147.

<sup>5</sup> 2 S. C. Stats., p. 25.



and the Proprietors, had the effect of stopping for a time the indulgence which had been so freely granted to the freebooters.

The most casual observer of Carolina history can perceive that long before the period at which we have now arrived, the colonists had conceived very much of a contempt for the authority of the Lords Proprietors. They were loyal enough to the British government, but they held but slack allegiance to their immediate rulers. From them they received scant consideration, and it is not surprising that their loyalty should not have been of a very ardent nature. Nor did they lack justification for this sentiment. Their grievances against the Proprietors were not a few. The fact that they were compelled to pay their quit-rents in money, instead of in produce, was a source of constant irritation, and not infrequently of real distress. The action of the Proprietors in regard to the expedition against St. Augustine also engendered much bitterness, and no little jealousy was caused by the special favor shown to the Scotch followers of Lord Cardross at Port Royal, and to the newly-arrived French Huguenots.<sup>1</sup> Consequently the colonists yielded little obedience to the Proprietors' instructions, except when forced to it by such peremptory measures as were adopted by Colleton to stop the late armament against the Spaniards; and they could hardly have been expected to resign so profitable a connection as that with the pirates, merely at the command of a board of gentlemen three thousand miles across the sea, who only looked upon the colony as an enterprise for the betterment of their private fortunes.

But Colleton did his utmost in the face of every difficulty to enforce a proper observance of the laws, and whatever other lawlessness may have prevailed during his administration, the pirates were received in Charles Town with less favor than in many years. But however strenuously he

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<sup>1</sup> Doyle, p. 362.

attempted to do his duty, he was seriously handicapped by the action of the Proprietors, which had for some time been most arbitrary. It was about this period that a contest arose between the Governor and the Proprietors on one side, and the Colonial Assembly on the other, which was, of course in a very modified degree, somewhat of a parallel to the great contest between the King and the Commons, which a half-century previous had culminated in the great rebellion in England.

\* The struggle had been in progress for some time when in 1689 the Proprietors ordered Colleton and their deputies<sup>1</sup> to convene no more Assemblies, without specific instructions, except in cases of extraordinary necessity.<sup>2</sup> As the laws were enacted for a term of only twenty-three months,<sup>3</sup> in 1690 the Province found itself without a single statute in force.<sup>4</sup> This was indeed an unfortunate state of affairs. It had been with the greatest difficulty that the laws against piracy had been enforced at all, and now that they had expired by limitation it was only to be expected that within a few months the entire coast would be overrun by them. Governor Colleton did not deem this one of the "extraordinary occasions" which the Proprietors had excepted in their instructions, and instead of calling an Assembly in order to meet the exigency, he declared the Province to be under military rule.<sup>5</sup> It would hardly be fair to criticise him for this action, however, because, had he convened an Assembly, it is probable that nothing would have been done. The point of dispute was the claim of the popular House

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<sup>1</sup> The Proprietors' deputies with the Governor and a number of members elected by the Commons House, constituted the "Upper House" of the Assembly. See Winsor, Vol. V., p. 307, for the method of choosing them at the time of the founding of the colony.

<sup>2</sup> Props. to Sothell, May 12th, 1691: Rivers, 432.

<sup>3</sup> Fundamental Constitutions LXXVI. Many statutes contained a provision for their expiration at the end of this period.

<sup>4</sup> Address to Sothell. Rivers, p. 423.

<sup>5</sup> *Ibid.*

that a bill did not have to "necessarily pass the Grand Council before it be read in Parliament,"<sup>1</sup> and it was not to be supposed that either party would recede from its position. It was claimed that the declaration of martial law was brought about by petitions which had been most irregularly drawn, many signatures having been forged, and great excitement followed upon the proclamation. "Many prepared to leave the cuntrey," says a contemporary account; "but most people were soe weary of the discontents that attended their thoughts upon this illegal, tyrannical and oppressive way of Government, that they were more concerned to be provided against their friends and fellow Subjects here, than the publick Enemy abroad, and the ferment grew soe high that nothinge but desperation was generally observed among the people."<sup>2</sup>

Just at this juncture Seth Sothell, one of the Proprietors, arrived in the Province and assumed direction of the government. Colleton was banished, and required to give bail in the sum of £10,000 for his appearance at Westminster to answer to such charges as might be preferred against him.<sup>3</sup> At the same time Stephen Bull and Paul Grimball, members of the Council, and Charles Colleton and Thomas Smith, Sr., were disabled from holding office because of the part they played in encouraging martial rule.<sup>4</sup> Having thus rid himself of his opponents, Sothell commenced an administration which was most remarkable for official outrage, if not deliberate crime.<sup>5</sup> In the meantime the pirates, encouraged by the unsettled condition of the colony, had renewed their relations with their friends in various parts of the Province; and Sothell, under a pretense of enforcing the laws

<sup>1</sup> Address to Sothell. Rivers, p. 423.

<sup>2</sup> *Ibid.*

<sup>3</sup> 2 S. C. Stats., pp. 45, 46.

<sup>4</sup> *Ibid.*, p. 49. These acts were annulled by the Proprietors and Grimball was ordered restored to all his honors. See N. C. Col. Rec., Vol. I., p. 382.

<sup>5</sup> See S. C. Hist. Soc. Coll., Vol. I., pp. 126, 127, 128.

against them, took occasion to imprison persons objectionable to him, falsely alleging them to be connected with the piratical trade.<sup>1</sup> The indignation which this aroused doubtless had much to do with causing a reaction in favor of the pirates, and when Philip Ludwell, Sothell's successor,<sup>2</sup> arrived, they were again ingratiating themselves with the people, and promised to give much trouble in the near future.

The new Governor's instructions contained special reference to these outlaws. Wrote the Proprietors: "You are to use your utmost endeavour to seize any Pyrats that shall come to Carolina, and you are to prosecute all such as shall presume to trade with them, or have any commerce with them contrary to law, to all the utmost rigor the law allows."<sup>3</sup> How he succeeded in fulfilling his instructions will be seen. For the better governance of the colony he was also ordered to make an effort to consolidate the Assemblies of North and South Carolina at Charles Town.<sup>4</sup>

Ludwell entered upon his office at the beginning of a stormy period. The recent agitations had stirred the colony almost to a point of civil war, and its safety was threatened by foes without and within. The pirates were rising to the height of their power, and were beginning to have very broad notions of the dignity of their position in the world. Their trade at this time had splendid traditions, and the lawless rovers of the sea, proud of the records of their predecessors, were becoming as bold and arrogant as the Barbary monarchs of the African coast. It was with pride that they recalled the time when their power enabled them to turn from the chase of merchant vessels on the high seas to the bombardment of fortified ports, and the sack of the rich and

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<sup>1</sup> Proprietors to Sothell, May 12, 1691, in *Rivers*, p. 431. A number of these complaints refer also to the period just preceding this, when Sothell was Governor in N. C.

<sup>2</sup> Commissioned Governor, Nov. 8th, 1691.

<sup>3</sup> N. C. Col. Rec., Vol. I., p. 380.

<sup>4</sup> *Ibid.*

populous cities of the Spanish Main. They remembered with a glow of insolent satisfaction the stern terms to which they had forced the governors of more than one powerful colony, and their more recent successes had filled them with an arrogance which now threatened every port on the Atlantic seaboard with invasion. They no longer sought the toleration of any people with whom they were inclined to trade. What they wished they demanded, and it was not often that any one had the temerity to oppose them with open force.

It has never been clearly shown what encouragement the pirates received at the hands of Governor Sothell during his brief and tyrannical rule, but the rumors of the time were sufficient to justify the Proprietors in ordering Ludwell to examine into charges which had been preferred of granting commissions to pirates, for which he is said to have received substantial reward.<sup>1</sup> The investigation, if it ever took place, amounted to practically nothing, as might have been expected. Sothell was too wise not to cover his tracks behind him, and it is probable that there was no one in the Province who could have ventured to give evidence against him without very seriously implicating himself.

But Ludwell soon found that it was a greater task than he could accomplish to look after the pirates of his own time, much less to successfully investigate their doings during the reign of his predecessor. While no specific blame ever has been attached to him for improperly administering the laws against the freebooters, nor have any such charges ever been made against him, the condition of the Province permitted them to enjoy a greater freedom during his administration than they had done for many years previous. Soon after his accession a crew of forty men arrived in a vessel called the *Royal Jamaica*, bringing with them large quantities of silver and gold. By means of their wealth they found immediate favor with many of the people, and the officials were

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<sup>1</sup> N. C. Col. Rec., Vol. I., p. 383.

so far swayed by considerations of which history does not speak, that they were permitted to remain in the Province unmolested, on the condition of their entering into bond to keep the peace for a year, the Proprietors in the meantime being applied to for a grant of indemnity in their favor.<sup>1</sup> Another instance recorded of this administration, showing how the law was disregarded, was the case of a vessel which was wrecked on the coast, the crew of which escaped and came to Charles Town. These men boasted openly of having been on a piratical cruise in the Red Sea, where they had plundered numerous vessels belonging to the Grand Mogul. It is not recorded that any of the villains were ever brought to justice, nor is there any reason to believe that they were even placed under arrest, or required to give bond, as was done in the case of the crew of the *Royal Jamaica*.<sup>2</sup> Edward Randolph, surveyor-general of his Majesty's customs in America, in reporting the case to the home government, says: "They were entertained, and had liberty to stay or goe to any other place."<sup>3</sup>

Under Ludwell's administration matters grew from bad to worse, until they reached a disgraceful point. The pirates who were brought to trial escaped by shameless bribery of the juries, and some of the highest officials of the courts were not free from imputations of the most corrupt conduct. The Assembly went so far as to pass an act "To provide for Indifferent Jurymen in all causes Civill and Criminall," which the Proprietors annulled on the ground that it was "very unreasonable, and many ways dangerous and tending to the lending [leaving] the most enormous Crimes unpunisht, especially Pyracy."<sup>4</sup> "It will thereby be in the power of the Sheriff," wrote the Proprietors to the

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<sup>1</sup> Hewat in Carroll's Coll., Vol. I., p. 106.

<sup>2</sup> *Ibid.*

<sup>3</sup> S. C. Hist Soc. Coll., Vol. II., p. 196. Also N. C. Rec., Vol. I., p. 467.

<sup>4</sup> S. C. Commons House Journals, No. 1, p. 58, Props. to Gov. and Deputies, 10th Apr., 1693.

Governor and their deputies, "so to divide the twelve for each paper that there shall be in every paper some notorious favorers of Pyrates who, coming prepared for it, may be able to constraine the rest of the jury to consent to what verdict they please."<sup>1</sup> It is highly probable that the constraint referred to here was that of flagrant bribery in the jury-room. At the same time the Proprietors found it necessary to annul a law which had been enacted governing the election of members of the Assembly. This act was so very loose in its construction, that "all the Pyrates that were in the Shipp that had been plundering in the Red Sea had been qualified to vote for Representatives."<sup>2</sup> The only requirement was that the voter should possess ten pounds, or property valued at that amount, and the pirates with their stolen gold were thus qualified as fully as the oldest freeholder in the colony.

But all these measures failed to have the desired effect. Charles Town was completely overrun by pirates who flocked into Carolina from every quarter. By means of their ill-got gold they corrupted the people, and set the law at utter defiance. "The courts of law," says Hewat, "became scenes of altercation, discord and confusion. Bold and seditious speeches were made from the bar in contempt of the Proprietors and their government."<sup>3</sup>

There was, however, a very considerable element in the colony that strove to maintain the honor of the Province, and to have the criminals brought to justice, and in order to counteract its influence, the friends of the pirates determined to take steps to secure their certain immunity. The Governor had no right to grant any pardons except such as were authorized by the Proprietors, and a bill was introduced into the Assembly which convened in September, 1692, which granted complete indemnity to all pirates and their

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<sup>1</sup> S. C. Commons House Journals, No. 1, p. 58, Props. to Gov. and Deputies, 10th Apr., 1693.

<sup>2</sup> *Ibid.*

<sup>3</sup> Hewat in Carroll, Vol. I., pp. 106-107.

accomplices. This was the subject of high and fierce debate, which was, however, interrupted by the receipt of the intelligence from the Governor that he would place his veto upon any such act. Foiled in this, they enacted a law giving the colonial magistrates the power to enforce the English Habeas Corpus Act,<sup>1</sup> and by this means many pirates escaped justice and took up their residence in the colony.<sup>2</sup>

It now seemed practically impossible to do anything to stamp out the evil which had so grafted itself upon the life of the Province. The authority of the Proprietors was powerless when matched against pirate gold, and finally despairing of ever securing justice in the Provincial courts, and desiring to do something to satisfy the colonists, and recover them from their seditious condition, they issued in April, 1693, letters patent, granting full pardon for all offenses committed in Carolina prior to Ludwell's accession, with the exception of piracy, treason and murder.<sup>3</sup> The friends of the pirates were not pacified, however, and the records fail to show that a single one of the freebooters was brought to trial.

This effort to conciliate the colonists seems to have borne some fruit, however. During Ludwell's administration the Province had reached its lowest ebb, both morally and commercially. The lawless element had done its worst and could go no further, and it was time for the tide to turn in the opposite direction. Under the firm and patient administration of one of the Proprietors the reaction came, and we shall soon see how the colony shook off the domination of its most depraved class, and rose to a position of dignity and honor from which it never again receded.

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<sup>1</sup> 2 S. C. Stats., p. 74. The original of this statute is lost.

<sup>2</sup> Hewat in Carroll, Vol. I., p. 107.

<sup>3</sup> S. C. Hist. Soc. Coll., Vol. I., p. 130. Hewat says the pardon was extended to all pirates except those who had plundered the Grand Mogul's possessions, but I am able to find no verification of this statement.



## CHAPTER II.

Governor Ludwell's administration, despite his earnest efforts, had not been a success, and after having held office for a little more than two years, he was superseded by Thomas Smith in November, 1693. Smith was at this time probably the most prominent man in the colony. He had served in Ludwell's Council, and in return for his public services had been elevated by the Proprietors to the provincial nobility, bearing the honorable title of Landgrave. During a period when political virtue was at a discount, he had maintained his integrity unspotted, and by his unswerving adherence to the right, commanded the respect of both friends and enemies. As the leader of the better class of the colonists, it was thought that he would in a short time be able to place Carolina on a peaceful and prosperous footing. Along with his commission,<sup>1</sup> he received instructions to enforce the law against the pirates most rigidly, so that there might no longer be any reason for the charge that these outlaws found a safe retreat in the colony;<sup>2</sup> and to report why the Red Sea pirates, lately come into the Province, had not been brought to trial.<sup>3</sup> He was also ordered to carry out what Ludwell had failed in, namely, to consolidate the Assemblies of the northern and southern divisions of the Province at Charles Town.<sup>4</sup> But Smith's brief reign was a disappointment to both Proprietors and people. He had been in office less than a year when, despairing of peace

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<sup>1</sup> A facsimile of Smith's commission appeared in *Harper's Magazine* for December, 1875.

<sup>2</sup> Instructions to Smith, *S. C. Hist. Soc. Coll.*, Vol. I., p. 135.

<sup>3</sup> *S. C. Hist. Soc. Coll.*, Vol. I., p. 134.

<sup>4</sup> *Ibid.*

and order, he wrote to the Proprietors resigning his post, and announcing that he and a number of other gentlemen had determined to leave Carolina and seek homes in a less turbulent part of America.<sup>1</sup> "It was impossible," he said, "to settle the country unless a Proprietor himself was sent over with full power to heal their grievances,"<sup>2</sup> and without waiting to hear from England, he vacated the office, leaving Joseph Blake in charge of affairs.

As might have been expected, the pirates were only friendly to the Carolinians as long as it was to their interest to be so. The Proprietors had not yet been able to do anything for the colony when the people were thrown into a state of consternation by reports that the outlaws were preparing "to attempt the plundering and burning" of Charles Town. Memories of the sack of Panama and Porto Bello, and of the appalling atrocities which followed upon the fall of Maracaibo, a quarter of a century before, were recalled by the old settlers, and the terrified people in anticipation saw their city go up in smoke and flame, and beheld its embers quenched in the blood of defenseless women and children. The Assembly met, and a petition was hurried across the ocean, in which the circumstances were narrated, and particular emphasis laid on the urgent necessity of fortifying the harbor.<sup>3</sup> But weeks passed without any hostile demonstrations on the part of the pirates, the panic which the threats and rumors had produced subsided, and in a short time the terrors of the people were forgotten.

The Proprietors, who received the desperate news in a most philosophical manner, and seemed to care little for the fate of the colony, had in the meantime acted upon Governor Smith's resignation, and followed his suggestion in regard

<sup>1</sup> S. C. Hist. Soc. Coll., Vol. I., p. 135. Smith did not leave the colony, but died shortly after this. See *Ibid.*, p. 138.

<sup>2</sup> Archdale in Carroll, Vol. II., p. 101.

<sup>3</sup> S. C. Commons' House Journals, No. 1, p. 104. This petition was dated Feb. 5th, 1695.

to sending one of their number to Carolina. They first selected a grandson of the great Earl of Shaftesbury for the mission, but the young nobleman preferred a life of luxury in London to the hardships of a residence in the wilds of America, and promptly declined the appointment. They then chose John Archdale, a Quaker Proprietor, and sent him out, armed with all the powers of a dictator, to bring the Province back to a state of peace.

Whatever Smith's failure on other points may have been, he had succeeded in at least one instance in enforcing the pirate law in a more rigid manner than had been done in many years. He had reported to the Proprietors the full proceedings of the trials and convictions, and when Archdale arrived about the middle of the year 1695, he found instructions awaiting him regarding a number of the freebooters who had been reprieved until the pleasure of the English authorities concerning them could be learned. These instructions were fully consistent with the wavering policy the Proprietors had always followed concerning the punishment of crime in the Province. Although they had directed Smith to enforce the law against the pirates with the utmost severity, and had inquired somewhat sharply into the failure of Governor Ludwell to bring the Red Sea outlaws to justice, now that convictions were secured, they ordered Archdale to pardon the condemned men, and transport them to whatever place he saw fit.<sup>1</sup>

Archdale's mild but firm rule did much to allay the troubles of the colony, and the seeming willingness of the people to forget their political differences indicated that much of their previous trouble had been due to the fact that the governors either could not, or would not, understand them and their needs. But in spite of all his efforts for the good of Carolina, Archdale did not escape the charge of encouraging, and even dealing with, the pirates. Edward Randolph reported that he had harbored the outlaws, and

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. I., p. 138.

had been paid for his indulgence toward them.<sup>1</sup> These charges, which were not made until some time after Archdale had retired from the government, also implicated his successor, Joseph Blake, and Vice-Admiralty Judge Morton.<sup>2</sup> Several alleged cases were cited in the report, and Randolph, in commenting on them, recommended as the remedy that the Crown assume control of Carolina and all other proprietaries in America.<sup>3</sup> Fortunately for the good name of the accused officials, Randolph's statements are not to be taken as good evidence in matters concerning the colonies. His notorious unreliability and his bitter prejudice against everything American, has been clearly shown in the history of New England of this period,<sup>4</sup> and the names of the Carolina officials have suffered no taint in consequence of his charges. At the time, however, they had the effect of bringing a letter from the Board of Trade to the Proprietors, complaining that his Majesty had been informed of these irregularities, and warning them that they must not be repeated "under the severest penalties." It is but just to add that when the pirate Every was tried in England, much damaging testimony regarding Carolina was brought out, and it was alleged that the pirate Want was at that time fitted out from the Province. The Proprietors were commanded to apprehend all pirates who might come into Carolina, and to make a report on the subject at an early day.<sup>5</sup>

Randolph's complaints were by no means leveled at Carolina alone, and although he is quite explicit in mentioning

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<sup>1</sup> "Mr. John Archdale, the late Govr., permitted some of Every's Men who came from Providence to Land, and bring their money quietly a shoar, for which favour he was well paid by them."—Randolph to Lords Commissioners for Trade, N. C. Col. Recs., Vol. I., p. 545.

<sup>2</sup> N. C. Col. Rec., Vol. I., p. 546.

<sup>3</sup> *Ibid.*, p. 548.

<sup>4</sup> See Hutchinson's Mass., Vol. I., pp. 319, 329. Also Chalmers I., pp. 320, 406, 409.

<sup>5</sup> N. C. Col. Rec., Vol. I., p. 475. Also S. C. Hist. Soc. Coll., Vol. I., pp. 204, 205.

that Province, it was a fact that at this time nearly every colony in America was, in one way or another, offering encouragement to the pirates. The minutes of the Provincial Council of Pennsylvania teem with notices of the freebooters on that coast, and were all the references given, the array would weary the eye of the reader; in the first volume alone no less than twenty-one are to be found; in the second, thirteen; and in the third, eight. This is without including a number of minor notices from which no clear inferences can be drawn. Watson is the authority for the statement that about this time a son of Deputy Governor Markham, of this Province, was denied a seat in the House because of his dealings with pirates.<sup>1</sup> In New England the situation was but little better. The same "embarrassment of riches" is encountered in the records here as in Pennsylvania, and the reader is referred to the indices to the Massachusetts Historical Society Papers, to Arnold's History of Rhode Island, and to Mr. Weedon's Economic and Social History of New England, where the notices will be found in sufficient quantity to satisfy the most capacious historical maw. Every one is familiar with the culpability of Governor Fletcher of New York and his secretary, Nicholls. So notorious was Fletcher's connection with the freebooters that his successor, Lord Bellamont, recommended that he be sent to England to be tried for piracy; but for some unknown reason the recommendation was never carried out.<sup>2</sup>

Archdale vacated the Governorship in South Carolina in 1696, appointing Joseph Blake, his nephew, as his successor. Blake's administration was a peaceful one, although it was during his term of office that the renewed complaints came from his Majesty's Council to the Proprietors<sup>3</sup> concerning the Carolina pirates. An examination of these complaints shows quite conclusively that though Blake's name was

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<sup>1</sup> *Annals of Philadelphia*, Vol. II., p. 216 *et seq.*

<sup>2</sup> See also *N. J. Archives*, 1st Series, Vol. II., pp. 157-162.

<sup>3</sup> *S. C. Hist. Society Coll.*, Vol. I., pp. 205, 206, 207.

directly connected with them, they were but repetitions of the old charges of several years before, and that there were no new cases upon which they were based. The Proprietors, however, sent over the Jamaica law against piracy for promulgation. The contemporaneous records do not give the previous history of this act, but it was in all probability the same old law which had been promulgated years before at the command of Charles II., and which had either become a dead letter in the Province, or had been permitted to expire by limitation.

This act, with the accompanying instructions from the Proprietors, was brought into the Assembly on September 19th, 1698, and was made a special order for the 22d of the same month. On that day the House resolved itself into a "Grand Committee," with Dr. Charles Burnham in the chair. It seems that the committee, with commendable independence, determined not to swallow the Jamaica act whole, but to prepare a new one, retaining all the chief features of the other. Accordingly it was agreed to report the following resolutions:

"Resolved, That a Bill be Drawn up for the Method of Trying Privateers and Pirates.

"Resolved, That it shall be felony for any subject of the Kingdom of England to serve any prince or potentate whatsoever in an hostile manner against his said Majesty or any of his subjects.

"Resolved, That the act doe provide for the tryall of all treasonous felonies, pyracies, robberies, murders, or confederacies that shall hereafter be committed upon the seas where the Admiral hath jurisdiction.

"Resolved, All former proceedings against the aforesaid offenders be ratified,<sup>1</sup> and all officers indemnified.

"Resolved, That those who hold correspondence with such persons after proclamation shall be fined or imprisoned.

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<sup>1</sup> This has general reference to the class of criminals mentioned in the foregoing sections, and not to any special offenders.

"Resolved, That power be given to commission officers to raise forces for apprehending pyrates after proclamation."

On the committee rising, and the speaker resuming the chair, the House adopted the above report, and ordered "that a Bill for restraining and Punishing Privateers and Pyrates [be] committed to Doctr. Charles Burnham, Mr. John Buchley, and Mr. Robert Hall to be repaired [prepared]." The next day "A bill for the restraining and punishing of privateers and pirates" was read "the first time and passed with amendments." The word "passed" as used here cannot mean that it became a statute on this occasion, as the rule was that all bills should be "read three several times on three several days, in each house,"<sup>1</sup> before they could pass into laws. The journals contain no further reference to it until a session which was held two months later, and it is certain that it was either defeated, or lost in a rush of bills on the calendar. On the 19th of November "the Humble Address and Remonstrance of the Members of the House of Commons" to the Proprietors, complained "that the Government pretends to putt in practice and force an Act entitled an Act for the restraining of Privateers and Pyrates, dated the — day of — which was never made according to any of your Lordshipps Instructions, Rules of Government, and Constitutions, nor with the consent of the major part of the delegates of the people, and which also wants a confirmation under hand and seal in open Assembly."<sup>2</sup> Whether this remonstrance arose from a desire to protect the pirates, or from a simple desire to protest against usurpation of authority on the part of the government, is not known, but the occasion of it is very evident. The Governor and the Lords Proprietors' Deputies, constituting the "Upper House" of the Assembly, had sent the bill to the

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<sup>1</sup> See S. C. Commons House Journals, No. 1, pp. 189, 191, 192, 193, for a history of this measure.

<sup>2</sup> "A Letter from S. C.," p. 23.

<sup>3</sup> S. C. Commons House Journals, No. 1, p. 215.

Commons "for their concurrence."<sup>1</sup> The Commons had not concurred, and occasion having arisen for the enforcement of some law against the pirates, the government assumed the responsibility of enforcing the terms of the Jamaica act which had failed of passage in the House. Hence the remonstrance on the part of the latter.

Although the prosperity of the pirates was undoubtedly waning, they still continued such a menace to American commerce that in 1699 the English authorities realized that mild measures would no longer have any effect, and proceeded to pass through Parliament an act of such severity as to drive the greater part of the outlaws from the American seas.<sup>2</sup> This act was largely a revival of the act of 28 Henry VIII. It recited the great inconvenience incident to the transportation of pirates from distant colonies to England for trial, and authorized their trial on shipboard or on land by certain officers who were to be constituted commissioners for that purpose. The court was to consist of seven members, any three of whom could organize it for business. A colonial Governor, or Lieutenant-Governor, a member of Council, or a commander of one of his Majesty's ships, must be on the commission, and all members were called upon to subscribe to a specially prepared oath before they could sit in judgment on any case. After hearing the testimony in open court, the judges were to hold a private session and determine the guilt or innocence of the accused by a majority vote. Presumably on a modification of the principle of he who lives by the sword shall perish by the sword, it was provided that the condemned should be put to death "in such place upon the Sea, or within the Ebbing and Flowing thereof as the President, or the major part of the Court" might appoint. It was also enacted that "whereas severall evill disposed persons in the Plantations and elsewhere have contributed very much toward the Encrease and

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<sup>1</sup> S. C. Commons House Journals, No. 1, p. 189.

<sup>2</sup> Statutes of the Realm, 11 W. and M.



Encouragement of Pirates by setting them forth, and by aiding, abetting, receiveing and concealeing them and their Goods, and there being some Defects in the Law for bringing such evill disposed Persons to condign Punishment," all such persons after the 29th of September, 1700, should be adjudged pirates and dealt with accordingly. Special pensions were also guaranteed to persons who might be wounded in expeditions against the pirates, and in the event of any volunteers being killed, it was provided that their families should be provided for by the government. Rewards were also offered to informers, and in cases where the colonial officers refused to assist in suppressing piracy, the charter of the colony was to be forfeited to the Crown. Masters of vessels marooning any of their crew, or leaving them in distant parts, thus throwing in their way the temptation "to go upon the grand account"—to use the old phrase—were liable to conviction and imprisonment. This act was to be in force for a period of seven years. By an act of 6 Anne this statute was renewed for a like term of years, and by an act of 1 George I. was again continued for five years.<sup>1</sup> During the year 1708 a general pardon was declared throughout the British dominions, from which pirates were expressly excepted, although this was not necessary, as by the common law they could not be included in the operation of general pardons.

During the last years of Blake's administration several occurrences were recorded which indicate that the South Carolinians were well aroused to a sense of the infamy which attached to them from their connection with the pirates, although it is not improbable that they were brought to this mind largely by the losses which they themselves were now suffering from piratical depredations. The new and purer condition of public sentiment which followed upon the administration of Governor Archdale was, during the last decade of the century, greatly strengthened by a change in

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<sup>1</sup> N. C. Col. Rec., Vol. II., 319.

the industrial life of the Province, brought about by the introduction of rice. Previous to this time South Carolina had had no staple crop, her exports being of a miscellaneous character, and constantly varying in quantity. In common with all the other English colonies, South Carolina had been greatly affected by the operations of the Navigation Acts, but now, after the lapse of years, the condition changed. Although still forced to sell in a single market, at prices little influenced by demand and supply, the Carolina planters saw that they had opportunities of becoming rich off the proceeds of their great rice plantations.<sup>1</sup> In 1699 the crop was so extensive that, owing to the loss of many Carolina vessels in the war between France and Spain,<sup>2</sup> sufficient tonnage could not be found to transport the crop to the markets on the other side of the water. Rice was a most profitable export, although as a matter of course the profits depended entirely on its safe arrival in England. The Carolinians therefore began to be very much annoyed when their valuable cargoes were captured by the pirates, and they soon learned to look upon their former friends and allies with a distrust which developed into a hatred which made Charles Town no longer a safe or pleasant residence for the depredators.

During this year a party of about forty-five men—English, French, Portuguese, and Indians—attracted by the spoil that awaited them, set out on a piratical cruise from Havanna. They lay in the vicinity of Charles Town for some time, taking several vessels belonging to the Province, which they retained and adapted to their own uses, after

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<sup>1</sup> One reason of this was that England permitted the colonies to send to other countries such exports as were not wanted at home, and England does not seem to have been a great rice consuming country. I have not the statement of exports for this period, but for the period between 1720 and 1730 only 30,000 bbls. of rice went to England, Ireland and other plantations, against 83,379 to Portugal alone, and 372,118 to Holland, Hamburg, Bremen, Sweden and Denmark. See Courtenay's Year Book for 1880, p. 245.

<sup>2</sup> Edward Randolph in S. C. Hist. Soc. Coll., Vol. I., p. 211.

sending the crews on shore. They had not been on the Carolina coast many weeks, however, before they quarreled over their spoil, and the Europeans and Indians combined against the Englishmen, and turned them adrift at sea. After numerous hardships, the abandoned party landed at Sewee, now Bull's, Bay, and came to Charles Town overland, where they told an ingeniously concocted story of having been shipwrecked on the coast. Unfortunately for them, however, the masters of three vessels they had recently taken, happened to be in Charles Town, and recognized them without difficulty as their captors of a few weeks before. They were immediately apprehended and condemned to death, the sentence being executed on seven out of the nine.<sup>1</sup>

This must have occurred before the news of the English act reached the Province, and followed within a short time, as it probably was, by the intelligence of the severe measures the home authorities were preparing to enforce, it resulted in almost the entire extermination of the pirates in Carolina, and they did not show themselves on the coast again for many years.

Soon after, a number of pirates came into Charles Town with declarations of their intentions to abandon their evil ways; and there being no evidence against them on which they could be convicted, they were permitted to live undisturbed in the Province.

The manuscript records now preserved in the Probate Court of Charleston indicate some peculiar practices that were in vogue in that day. Among them is a power of attorney filed by one Samuel Saltus of Bermuda, delegating to John Jones, locksmith, the right to sue in his behalf for the recovery of a certain sloop which had been captured from him by one Lewis Ferdinando, a pirate, and his company, if she should at any time be brought into Carolina.<sup>2</sup> Accompanying this is an order issued by Governor Blake,

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<sup>1</sup> Hewat in Carroll, Vol. I., p. 127.

<sup>2</sup> Probate Court MS. Rec., Charleston County, 1694-1704, p. 244.

that Matthew Tyrer should not again be put in jeopardy of his life on the charge of taking this sloop, as he had been accused before the Grand Jury and acquitted.<sup>1</sup>

Having promulgated the act of 1699, King William was not disposed to be too severe on those who might wish to stop their career of crime, and enter once more upon an honest life. Accordingly, in March, 1701, he proclaimed an Act of Grace, offering pardon for all piracies committed prior to June 24th, 1701, provided the outlaws would surrender and take the oath of allegiance within twelve months. Several pirates who had sailed with the notorious Kidd were in the Province, and they promptly surrendered and took the oath. Just how many of Kidd's crew were in Carolina at this time is not known, but there was evidently quite a number of them. In a letter to the Lords of Trade, dated from Philadelphia, February 28th, 1701, William Penn mentions Kidd's men as having settled in Carolina as planters, with one Rayner, their captain.<sup>2</sup> In 1700 Blake died, and was succeeded by James Moore, several of whose pardons to pirates can be seen in the Probate Court records, previously quoted. Numerous interesting affidavits in connection with these pardons have also been preserved.<sup>3</sup>

One of the last notices of the pirates of this period is found in the MS. Journals of the Assembly. In August, 1701, one Peter Painter, having been recommended for the position of public powder-receiver, was rejected by the Upper House. "Mr. Painter," ran the brief message to the Commons, signed by Governor Moore, "Having committed Piracy, and not having his Majesties Pardon for the same, Its resolved he is not fitt for that Trust."<sup>4</sup> There is no record of proceedings ever being instituted against Painter for his alleged crimes, however.

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<sup>1</sup> Probate Court MS. Rec., Charleston County, 1694-1704, p. 250.

<sup>2</sup> S. C. Hist. Soc. Coll., Vol. I., p. 213.

<sup>3</sup> See above cited records, pp. 297-98.

<sup>4</sup> S. C. Commons House Journal, No. 1, p. 392.

As has been seen, during the last years of the seventeenth century a rapid change came over public opinion regarding piracy and kindred crimes, and whatever their selfish interests may have been, it cannot be charged that the change of view among the colonists was wholly due to these. Carolina was advancing in dignity as a colony. She had begun to attract the attention of the world, and the influential men of Charles Town, the leaders in social and political life, were no longer of the adventurer class which had flocked to these shores thirty years before. Blake, who for a number of years had occupied a prominent position in the colony, had brought with him to America a large following of sturdy, honest, middle-class English Dissenters, who were good types of the latest settlers, and he and his chief adherents were men of integrity, who had come to Carolina with high motives for the extension of the dominion and power of England, and with a worthy pride in the future of this new world. The influx of Huguenots, too, had its effect. These people were now well established in the colony under the special protection of the English government, and although they were still regarded with a jealous eye as aliens and intruders, although they were not encouraged, and in some instances had met with political and even religious persecution, still their numbers and their high moral character had weight. Composing, as they did, the best element of the French masses, and driven from their prosperous homes in the fairest provinces of France because they would not yield their consciences to the corrupt standards of that abandoned age, it was only natural that they should view with abhorrence the toleration of these lawless hordes of sea-robbers. It was true that they had as yet but little part in the affairs of state, but they were enfranchised voters, and the position they were beginning to assume in mercantile circles was giving them an influence which was too frequently underestimated. Though the more lawless class in the colony was still numerous and powerful, and its influence in behalf of the pirates hard to overcome, the better element was slowly but surely asserting its supremacy. The

men to whom the enforcement of the laws was intrusted were no longer of the degraded type of Robert Quarry and his lieutenants of twenty years before. They were Englishmen with a pride in England and in the good name of her colonies, and the taunts of the Spaniards that Carolina was the nursery of lawlessness in America were not lost upon them. Their best efforts were put forth to redeem the honor of the Province, and after many years of toil and danger, they witnessed the triumph of their influence, which had so long seemed barren and hopeless. With the new period Carolina entered upon a new life, and when the eighteenth century dawned, the piracies which had ruined the commerce of some of the richest dependencies of England, were a thing of the past, and the colonies—especially those in the South—for more than ten years enjoyed an immunity from depredation such as had not been known since the foundation of the English Plantations in America. During the first years of the new century Charles Town, which had been the harbor for the greatest desperadoes of the western world, strung up pirates at the entrance of the port, scarcely waiting to hurry through the formality of a trial. The Province was able of itself to drive from the coast any outlaw who, more daring than the rest, might show his colors in those waters; and it was not until nearly two decades later that the continued Indian wars so depleted the strength of the colony that the pirates again overran the coast, laid the city under tribute, and for the second time succeeded in accomplishing almost the complete wreck of English commerce in the new world.

In noting the improvement in the moral condition of Carolina during the last years of the seventeenth century, we cannot lose sight of the Fundamental Constitutions of the Province. Much of the turmoil and lawlessness had been directly traceable to the operation, or rather the failure of the operation, of this utopian code, which the Proprietors insisted on enforcing in almost every impracticable detail. In 1693, during the administration of Ludwell, these Constitutions, which had been framed by the great philosopher Locke, to

be "the sacred and unalterable form and rule of government of Carolina forever," were to all intents and purposes abrogated.<sup>1</sup> This abrogation marks the turning-point in Carolina's early history. Although little immediate improvement was to be noted, the colony was placed in a position where reform could be worked out successfully. The influences which tended to a better condition of affairs could now have freer play, and nowhere did they manifest themselves so strongly as in the reaction against the pirates, which, as we have seen, commenced within a twelvemonth, and produced definite results even during the unsuccessful administration of Thomas Smith; and when Archdale appeared two years later, the people were prepared for the establishment of a government which should continue for many years prosperous and without reproach. The charter and their own statutes were all that they needed to maintain a strong and wholesome rule; and when in 1698 the Proprietors attempted to foist a revised set of the Constitutions on them, they asserted their charter rights, and utterly rejected the code.<sup>2</sup>

Another circumstance of much less importance, but which contributed greatly to allaying the irritation of the public mind, was the order of the Proprietors, made during Smith's administration, to the effect that legislative bills should be permitted to originate in the Commons, as well as in the Upper House of the Assembly.<sup>3</sup> This precluded the possibility of a recurrence of such a legislative deadlock as was witnessed in the time of Colleton, and gave great satisfaction to the people. From this time on, the popular House of the Assembly exercised the privileges and usages of the British House of Commons, which have been continued to the present day with but little modification.

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<sup>1</sup> Winsor, Vol. V., p. 313.

<sup>2</sup> The formal rejection of the Constitutions by South Carolina was not until Sept. 1st, 1702. See 1 S. C. Stats., p. 42.

<sup>3</sup> See S. C. Commons House Journals, May 15th, 1694.

## CHAPTER III.

In the preceding chapters the name Carolina has been used to designate all that territory owned by the Lords Proprietors which lay between Virginia and what was afterwards the colony of Georgia, although at one time three distinct governments existed within those limits: one at Albemarle, one at Cape Fear, and one at Charles Town. The terms "North" and "South" as applied to the divisions of the Province did not come into common use until about 1690, and before that time it was impossible to know to what part of the Province the charges of harboring pirates could be directly laid. "South Carolina" appears for the first time in the records in January, 1685.<sup>1</sup> It is first used in the statutes in 1696,<sup>2</sup> although it was not until 1729 that the two colonies were formally separated.

It was during the last decade of the seventeenth century that the part of the Province corresponding to the present State of North Carolina began to attract particular attention as a resort for pirates. Although it was an older colony than "Carolina south and west of Cape Feare," as the old documents described South Carolina, during its early days it was in a certain way subordinate to the southern portion of the Province. For many years it was nominally ruled "by a deputy commissioned by the Governor of South Carolina,"<sup>3</sup> although, to quote an old authority, "every one

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<sup>1</sup> MS. Grant Book G, S. C. Sec. of State's Office, p. 185.

<sup>2</sup> 2 S. C. Stat., p. 124. "North Carolina" appears in the Va. Council Proceedings in 1689. See N. C. Col. Rec., Vol. I., p. 357.

<sup>3</sup> Spotswood's Letters, Vol. I., p. 81. See *Ibid.*, p. 91, for reference to appointments of Thos. Carey and Edw. Hyde. See also Winsor, Vol. V., pp. 296-97.



did what was right in his own eyes, paying tribute neither to God nor to Caesar."<sup>1</sup> It was a country, wrote Governor Spotswood, "where there's scarce any form of government,"<sup>2</sup> and it is not surprising that the outlaws of that time found it a safe and pleasant refuge. "The common sanctuary of runaways" it had been styled,<sup>3</sup> and during all the turbulent years of the Proprietary government it had vied with many other English colonies in America in encouraging the pirates to frequent its coasts. As early as the year 1696 Edward Randolph reported that "pyrats and runaway servants resort to this place,"<sup>4</sup> and by 1700, during which year the same officer sent several reports to England, it had fully established its reputation as "a place which receives pirates, runaways and illegal traders."<sup>5</sup>

North Carolina, however, had not always been thus. When William Edmundson, the Quaker, visited it about twenty years after its settlement, "he met with a tender people,"<sup>6</sup> who lived in humble content along the banks of their noble rivers, and pursued their pastoral occupations in a state of almost Arcadian civilization. But numerous causes, more or less clearly defined by the earlier chroniclers,

<sup>1</sup> Byrd MS., ed. 1841, p. 32.

<sup>2</sup> Spotswood, Vol. I., p. 35.

<sup>3</sup> *Ibid.*, p. 108. According to Dr. S. B. Weeks in "The Religious Development in the Province of North Carolina," (J. H. U. Hist. and Polit. Studies, 10th series, V-VI., p. 49) Spotswood was "always notoriously unjust when writing of North Carolina affairs," but in the present instance he was eminently correct. Dr. Weeks himself says the colony had lapsed "into a state but one degree better than barbarism." (*Ibid.*, p. 8). In regard to Spotswood's injustice to N. C., a very careful reading of his letters fails to disclose it to the present writer, and his strictures on that government are freely corroborated by other authorities. Spotswood's actions when North Carolina needed his assistance would not seem to indicate that he was unduly prejudiced against the colony.

<sup>4</sup> S. C. Hist. Soc. Coll., Vol. II., p. 196.

<sup>5</sup> N. C. Colonial Records, Vol. I., p. 527.

<sup>6</sup> Fox's Journals, p. 453.

combined to work a change among them,<sup>1</sup> and by the beginning of the eighteenth century they had attained a by no means enviable reputation for harboring and dealing with the pirates who had now begun to make the numerous creeks and inlets of the coast their frequent resort. The North Carolinians had no such extensive maritime commerce as did the settlers at Charles Town, and were therefore seldom annoyed by the pirates infringing on their property rights.

To make matters worse, the authorities connived in a most shameless manner at the presence of these lawless freebooters, and they soon learned to know that they could come and go in North Carolina without hindrance. At a little later period "the Court of Admiralty was a regular sharper's shop,"<sup>2</sup> and there is no reason to believe that it was any purer during the time with which we are now dealing. The English authorities paid much less attention to this colony than to the one in South Carolina, and owing to the loose and indirect method of government, crimes could go unpunished in one settlement which would have met with swift and severe justice in the other. In South Carolina no one stood between the government and the Proprietors, the latter having a direct supervision over the affairs of the colony. Although the pirates were from time to time tolerated and encouraged, they could never consider the South Carolinians as friends who could be trusted. They knew not at what moment they might, at the order of the Proprietors, be apprehended and strung up in chains at the entrance of the port as a ghastly warning to evil-doers, as their companions had been treated on several occasions. In North Carolina they had no such apprehensions. The people were their friends, and the people were accustomed to treat the authority of their Governor with a contempt

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<sup>1</sup> The imposition of the Fundamental Constitutions had as much to do with it as anything else.

<sup>2</sup> Hawks, Vol. II., p. 206.

which made it impossible for him to enforce an unpopular law. If a Governor was sent them who was so unfortunate as to possess a tender conscience, they did not hesitate to lock him in prison<sup>1</sup> and run the government to suit themselves until they were given another by the South Carolina authorities.

The early history of North Carolina was sadly neglected by contemporary writers. "So carelessly has the history of North Carolina been written," says Bancroft, "that the name, the merits and the end of its first Governor were not known."<sup>2</sup> What little history we have of the early province makes scanty mention of piracy, presumably because the old historians found but little to say of it. The coast was thinly settled, and the outlaws could easily come and go among the people without causing any particular stir. Smuggling in those days was considered a legitimate occupation in all the colonies,<sup>3</sup> and when a vessel made her way up the rivers, past the customs officers, under the cover of night, no one took the trouble to inquire whether she was simply a contraband trader, or whether she flew the black flag from her masthead when out of the reach of the law. There were many available harbors along the coast whose shores had never yet been disturbed by the ring of the settler's axe, and here amid the loneliness of the forest the pirates could beach and burn their prizes, and never a rumor of their invasions come to the ears of the king's officers.

How long this went on it is impossible to say. It had been a practice of many years standing when we first hear of it, and there can be no possible doubt that it was with the connivance of the colonists that it was permitted to grow into the evil that it soon became. The North Carolinians certainly took no steps to rid themselves of their lawless

<sup>1</sup> Spotswood's Letters, Vol. I., p. 108.

<sup>2</sup> Note in Bancroft, Vol. II., p. 135 (orig. edition). Also see *Ibid.*, p. 134.

<sup>3</sup> As a result of the Navigation Acts. See above, pp. 17-19.

visitors, but following the example of their brother-settlers at Charles Town, did much to encourage them. It was not until the constant presence of the pirates in North Carolina became a source of great annoyance, if not of great danger, to the neighboring colonies, that any particular notice was taken of them, and even then we have few, if any, detailed and authentic accounts of their exploits. Complaints of their outrages became numerous, and frequent attention was called to the fact that they found a safe shelter from justice among the inhabitants of this turbulent colony. Evidently reliable testimony was hard to secure, and as only vague and general charges could be preferred, the commands of the Lords Proprietors to their Governors and Councils could only be of the most general nature,—so general, in fact, that nobody deemed it his duty to see that they were complied with.

Such was the situation in North Carolina at the end of the seventeenth century, and we have no reason to believe that the conditions were improved until very many years later. What was wanted was a strong power at the head of the government, and this was not enjoyed until the Proprietary rule was overthrown, and the Crown assumed direct charge of affairs.

From this picture we turn to view the situation which was about to be presented in South Carolina. It is indeed with a grateful sense of relief that the historian emerges from the misty years of the seventeenth century into the brighter light of the earlier decades of the eighteenth. During the latter period not only does he find records sufficiently complete and authentic upon which to base a continuous historical narrative, but he learns, too, that the colony during that time was making history for itself which was well worth recording. During the first thirty years of her existence South Carolina had done little which she could with any pardonable pride wish to hand down to posterity; the colonists evidently considered themselves no more than a very insignificant part of a very great whole, and it was not unnatural

that they made little, if any, effort to preserve their records. With the beginning of the new century, however, new ambitions began to enter into the life of the people. The colony had donned a robe of dignity, and some of her far-seeing, though obscure, statesmen began to realize that her career could, and should, be made long and honorable. We find a greater care exercised in the preservation of records, some feeble attempts to write her history, brief and unsatisfactory as it had been, and a little later one settler took so much interest in her political organization as to prepare an elaborate study of her whole governmental economy.<sup>1</sup> It is therefore with a feeling of satisfaction that we enter upon this new period, for henceforth we find the history of the colony an honorable one. True, it was torn by factional strife, but when was South Carolina ever other than turbulent? But this party warfare, the clash of Churchmen and Dissenters, and the wrangling of the people and the Proprietors over their alleged respective rights, do not seem to have had any immediate effect on the prosperity of the settlement. For more than ten years after the wholesome administration of Governor James Moore, the colony at Charles Town grew and prospered. The agricultural staples of the Province were in an increasing demand, and not only was Carolina rice quoted high in the markets of England, but the great timber tracts, which even to this day are far from being exhausted, supplied spars and masts for the Royal Navy, while the bounty placed upon naval stores in 1703 in hopes of breaking the Swedish monopoly,<sup>2</sup> had built up a great trade in that branch of exporting. The laws against piracy were so severe, and the determination of the government to enforce them so fixed, that the freebooters were scarcely heard of along the coast, although they continued to be a scourge to New England and the Northern colonies

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<sup>1</sup> See Note 1, p. 98.

<sup>2</sup> Cunningham's *Growth of English Industry and Commerce*, (1892), p. 285.

for many years later.<sup>1</sup> None of the Carolina records mentions them during these years, and it is quite evident that between the action of the South Carolina authorities and that of the English government, they were very generally driven out.<sup>2</sup>

In 1712, while Deputy Governor Hyde was striving to heal the dissensions which had recently torn North Carolina asunder, the South Carolina Assembly passed an omnibus bill which ordered the enforcement of the English pirate law along with many other laws of the mother-country which it was thought well to promulgate in the colony.<sup>3</sup> It is not known that there was any special reason for the passage of this law at this time. It is probable that it was passed simply as a measure of precaution, along with many other statutes of the realm which were thought to be applicable to conditions which might arise in the colony at any time. It is worth mentioning, however, that in October of the same year Governor Spotswood had written to the Council of Trade from Virginia that "the fear of Enemys by Sea (except that of Pyrates), are now happily removed by the peace."<sup>4</sup> No doubt, at this time, as at many others, there were rumors in the air about pirate incursions, but they were not sufficiently grave to give any real cause for alarm. The rumors continued, however, and came to the ears of the British government, which was the occasion of Spotswood writing late in the succeeding year (December, 1713) that he was "of the opinion that the Ship already here is Sufficient, and that there's no occasion to put her Majesty to a further Expence untill it appears that ye Pyrates are more formidable than there's yet any reason to apprehend they are."<sup>5</sup>

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<sup>1</sup> See 5 Mass. Hist. Coll., Vol. VI., pp. 109, 110 (Sewall's Journal).

<sup>2</sup> In the N. C. Col. Rec., Vol. I., p. 674, is a reference to pirates frequenting the N. C. coast. The date of this paper is 1707, but there is reason to suppose that the reference had regard only to times past.

<sup>3</sup> S. C. Stats., Vol. II., p. 470.

<sup>4</sup> Spotswood's Letters, Vol. II., p. 2.

<sup>5</sup> *Ibid.*, p. 45.

But despite Spotswood's protestations that the coast was in no danger, the South Carolina Assembly showed its wisdom by passing the anti-pirate law, and subsequent events proved that it was done none too soon. Even before the Assembly which enacted it was convened, clouds of disaster were hovering over the colony, portending a storm which was to last for years, and which was destined to expend itself in blood and revolution.

Late in the summer of 1711 the North Carolinians had some contention with the Tuscarora Indians, which on September 22d culminated in a fearful massacre of the whites.<sup>1</sup> South Carolina was appealed to for aid, and the troops sent out under Colonel John Barnwell succeeded in bringing the savages to terms after punishing them severely. In a few months, however, another fierce outbreak occurred, and South Carolina was again called upon to assist in suppressing it. It was not long before it became evident that the fires of insurrection had been kindled along the entire border, and South Carolina soon had as much as she could attend to in keeping down the savage tribes within her own limits. Cut off by six hundred miles of wilderness from the nearest strong colony, Virginia, she could not enjoy the benefits of co-operation with other settlements as could the colonies further north, but was thrown absolutely on her own resources for protection. At first these were very considerable, but continued heavy appropriations to meet the expenses of the war depleted the treasury, and by 1715 the Province was in a thoroughly exhausted condition. Many of the inhabitants had been slaughtered, and the planters had been compelled to flee from the outlying plantations to the protection of the town. The result was that few crops were planted for several successive years, and as the agricultural and farm products were the chief source of revenue, money and supplies became scarce, and the colonists found themselves in a position where ruin stared them in the face.

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<sup>1</sup> Spotswood's Letters, Vol. I., p. 118.

The Indians, recognizing their great inferiority to the whites, refused to meet them in a decisive battle, but resorted to bush-fighting and night-raiding, which made it necessary to keep a standing army in a continual state of organization, which was a great expense to the already impoverished colony.

In these trying times South Carolina found a friend indeed worth having in Lieutenant-Governor Spotswood of Virginia. Scarcely had this generous official heard of the condition of the colony than he took steps toward rendering them substantial assistance. He not only ordered the war-ship stationed on the Virginia coast to proceed immediately to Charles Town "to keep open the Communication with the Town," but "writt to ye Govern'rs to the Northward advising them to send likewise his Maj'ty's Ships in those Stations to visit y't place from time to time."<sup>1</sup>

This prompt offer of aid incited the South Carolinians to apply directly to Virginia for assistance in putting down the savages, and commissioners were sent to Williamsburg to ask for both men and arms. The response was characteristic of the people of the Old Dominion. Within fifteen days the envoys sailed back to Charles Town with one hundred and eighteen Virginia volunteers, and between forty and fifty more sailed a few days later.<sup>2</sup> By utilizing these auxiliary troops Governor Craven succeeded in forcing the Indians to at least an armed peace, although not until the entire country, to within twenty-five or thirty miles of Charleston, had been devastated.<sup>3</sup>

In the midst of all these hardships, when the colonists were almost ready to abandon their homes and estates, a still greater misfortune assailed them. Whatever their troubles with their savage neighbors had been, for years past the

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<sup>1</sup> Spotswood's Letters, Vol. II., p. 112.

<sup>2</sup> *Ibid.*, p. 119. See *Ibid.*, pp. 131-132, 135-136, for account of the ill-treatment of the Virginians by S. Carolina.

<sup>3</sup> *Ibid.*, p. 121.



commerce of the Province had been unobstructed by sea. Their produce, however small the quantity, had for a long time been delivered in the markets of England without any interference from their old enemies the pirates, and since all internal commerce had been destroyed by the Indians, the Carolinians now had nothing on which to depend save the trade with the mother-country. One can therefore easily imagine the consternation with which they received repeated rumors that the freebooters were beginning to reappear on the coast in no inconsiderable force. Frightened by the stringent provincial laws, they had years before retreated to their strongholds in the West Indies, but now that the South Carolinians were compelled to keep all their forces on the frontier, and were unable to punish the trespassers by sea, the pirates returned, and with their numbers greatly increased by the accession of many of the privateers which had been thrown out of employment by the recent peace of Utrecht, in a few months were a far greater menace than they had ever been at any previous time. They settled themselves at New Providence, in the Bahamas, and at Cape Fear, in North Carolina,<sup>1</sup> from whence they issued on their lawless excursions, diffusing the terror of their names along the entire North American coasts. James Logan, Secretary of Pennsylvania, is authority for the statement that there were in 1717 fifteen hundred pirates on the coast, eight hundred of whom had their headquarters at New Providence.<sup>2</sup> From timid and occasional ventures, they soon entered upon enterprises of the utmost boldness and audacity. Many of them combined together, and for five years they maintained themselves as the invincible masters of the Gulf of Florida and all adjacent waters, preying without distinction on the commerce of every nation whose flag was found upon the seas of the new world. They swept the coasts from New Foundland to South America, plundering their prizes at

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<sup>1</sup> Hawks, Vol. II., p. 272.

<sup>2</sup> Watson Annals, Vol. II., p. 218.

sea, or carrying them into Cape Fear or New Providence, as best suited their convenience.

For several years the South Carolinians, distracted by internal wars and dissensions, were too weak to strike a single blow in their own defense, and the pirates had the freest range along their coasts. In 1715 many captures were made, and it became evident that unless some immediate action were taken the commerce of the colony would be annihilated. Already had petitions for assistance been sent to England by both the South Carolina and the Virginia authorities,<sup>1</sup> but they were ignored, and the Proprietors were now earnestly entreated to give their suffering subjects some relief. The London agent of the colony, Abel Kettleby,<sup>2</sup> waited on their Lordships<sup>3</sup> and laid before them the pressing needs of the Province, but the reply given was most unsatisfactory. Evidently the Proprietors had lost interest in their American possessions, and did not propose to make any further outlay of money to keep up an investment which at best had been a disastrous one. But the energetic agent was not at the end of his resources. The affair was too serious to be made subject solely to the selfish action of the Proprietors. Englishmen, loyal subjects of the Crown, had been induced to go to Carolina by fair representations of the advantages of the country, and they could not now be left to perish in the wilderness without one effort being made to save them. All these arguments the agent doubtless presented to the Proprietors, but without effect, and he therefore boldly petitioned the House of Commons to interfere in behalf of their perishing fellow-countrymen in America. The Commons took the matter up without delay, and addressing the king, begged that relief should be given the colony immediately. George I. referred the matter to the

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<sup>1</sup> Spotswood's Letters, Vol. II., pp. 168, 169.

<sup>2</sup> Kettleby had been created a Landgrave in 1709. His patent, indited in Latin, is in the London State Paper Office. See S. C. Hist. Soc. Coll., Vol. I., p. 155.

<sup>3</sup> Hewat in Carroll, Vol. I., p. 200.

Lords Commissioners of Trade and Plantations, who decided that the government could do nothing unless the Proprietors vested the colony in the Crown.<sup>1</sup> On July 6th, 1715, the attention of the Proprietors was brought to this action, and two days later Lord Carteret addressed a letter to the trade commissioners, in which he made the following statement: "We, the Proprietors of Carolina, having met on this melancholy occasion, to our great grief find that we are utterly unable of ourselves to afford our colony suitable assistance in this conjuncture, and unless his Majesty will graciously please to interpose, we can foresee nothing but the utter destruction of his Majesty's faithful subjects in those parts."<sup>2</sup> After this confession it would seem that the Crown would have immediately assumed charge of the affairs of the Province, and have rendered the much-needed assistance, but no such event is to be recorded. We must not forget that England, in common with all the countries of Europe, viewed her colonies only as estates which were to be worked for the benefit of the mother-country, and that the economic school of that time taught her statesmen to consider the colonial trade only as a means toward increasing the public revenue. Maintaining such views, it is not surprising that the English government was unwilling to assume the responsibility of a Province which would prove nothing but an expense and a constant annoyance to the Board of Trade. It was much easier to force the Proprietors to continue their responsibility, and to hold them amenable for any complications that might arise. So other matters were allowed to push Carolina's grievances aside. Much correspondence ensued between the different

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<sup>1</sup> Hewat in Carroll, Vol. I., p. 201.

<sup>2</sup> N. C. Col. Rec., Vol. II., p. 188. See Yonge's Narrative in Carroll, Vol. II., p. 162, for an account of the manner in which the Proprietors conducted the business of the colony. It is not remarkable, after their wanton neglect, that they were unable to do anything for their subjects.

branches of the government, but it all ended in the colonists being left to take care of themselves as best they could.<sup>1</sup>

For more than thirty years previous to this time the Vice-Admiralty Court of the Province had been in an imperfect state of organization, owing largely to the fact that its jurisdiction had never been clearly defined.<sup>2</sup> It was a matter of serious doubt as to the source of its authority, and it was sometimes allowed to act, and sometimes ordered to stay its hand. Conflicting orders were constantly being transmitted to the Governor. First, he would be ordered to try all pirates in the provincial courts, and probably the very next ship would bring instructions to hold all such prisoners at the king's pleasure, or to send them to England to be tried before the Lord Admiral. But in 1716 the crimes over which the Admiral had jurisdiction increased so greatly in Carolina that a reorganization of the court became an imperative necessity. The indifference of the home government seems to have discouraged any thought of seeking the right to organize the court from the proper source, and in the summer of this year Lord Carteret, the Palatine, or President of the Board of Proprietors, issued a warrant to Nicholas Trott, the Chief Justice of the Province, authorizing him to sit as Judge of the Vice-Admiralty Court.<sup>3</sup> It is by no means clear what right the Proprietors, even when acting as a board, had to appoint judges in admiralty, and had the matter been investigated it is highly probable that this act of a single Proprietor would have been shown to be an undoubted usurpation of power. But England at this time was bestowing very little attention upon her colonies, and

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<sup>1</sup> See N. C. Col. Rec., Vol. II., p. 190, for Caleb Heathcote's account of the condition of affairs in Charles Town.

<sup>2</sup> The act of March, 1701, "For the better Regulating the Proceedings of the Court of Admiralty, etc.," applied only to the civil side of the Court. See 2 S. C. Stats., p. 167. It was repealed in May, 1703 (*Ibid.*, p. 214), and not again revived, although some of the usages of the English Adm. Courts were put in force by the omnibus act of 1712 (*Ibid.*, p. 401 *sqq.*).

<sup>3</sup> Hewat in Carroll, Vol. I., p. 206.

Trott did not let the cloud which might have been thrown upon his title deter him from speedily assuming his new dignity. His chief characteristic was a greed for power, and he was very prompt in the present instance to accept the additional trust which had been assigned him. The first record of his court of Vice-Admiralty is dated November 13th, 1716, which must have been very soon after his commission arrived out from England. Captain Nathaniel Partridge appeared as Provost-Marshal, and John Wallis, Gent., as "Register," or clerk.<sup>1</sup>

Whatever may have been Trott's faults—and he had many—he was a terror to all evil-doers who fell into his hands, and the fact that he presided over the court was a guarantee that no guilty man would escape. Encouraged by these circumstances, and having at last rid themselves of their Indian enemies, the colonists now turned their attention to bringing the pirates to justice. Their resources were exhausted, but this did not deter them from making earnest and repeated efforts. How and by whom the first captures were made, history does not relate, but at the sitting of the court on November 27, the grand jury returned indictments for piracy against nine men who were charged with seizing the sloop *Providence*, owned by William Gibson and Andrew Allen, two Charleston merchants, on August 2d, 1716. Judge Trott presided, assisted by the following persons who had received special commissions from England for this duty: "the Hon'ble Captain Thomas Howard, commander of his Majesty's ship, the *Shorham*; the Hon'ble Charles Hart, Esqr., one of the members of Our Council in South Carolina; the Hon'ble Coll. Thomas Broughton, Speaker of the Lower House of Assembly in South Carolina; Arthur Middleton and Ralph Izard, Esqrs.; Captain Philip Dawes; Capt. Will'm Cuthbert, Commander of the *Fortune* Frigate; Capt. Allen Archer, Commander of the Brigantine *Experiment*; and Samuel Deane and Edward Brailsford, Merchts."<sup>2</sup>

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<sup>1</sup> S. C. Admiralty Court Records, Book A and B.

<sup>2</sup> *Ibid.*

The fact that this trial resulted in a verdict of not guilty did not deter the colonists from continuing their efforts to stamp out the scourge. In April, 1717, the Province was further alarmed by news of activity on the part of the pirates in the West Indies, and it being probable that the *Shorham*, the war vessel stationed at Charles Town, would shortly be ordered elsewhere, the Commons House of the Assembly presented the following address to Deputy Governor Daniel and his Council:

“May it please your Honors: As this House has received information that the Governor of St. Augustine having advice and intelligence sent from the Governor of the Havana, to be upon his gourd, by reason of the design the Pirates at the Bahama Islands (and who are numerous) have to attack them; and as we cannot suppose, that any such persons have a regard to, or make any difference or distinction, between the people of any nation whatsoever; we ought to provide for the safty and defence of the Inhabitants of this Province, whom we are chosen for and sit here to represent; and as this House humbly conceives; that it would be requisite to address Capt. Howard, Commander of his Majesty Ship *Shorum* to desire him to stay some time longer here with his said Ship; and that it would in some measure deter the Pirates from coming here, while they know that a King’s ship does tarry among us; We therefore desire your Honors, to appoint a committee of your House, to join a committee of ours, in a conference to draw up the said address to Capt. Howard in case the same be agreed upon at the conference, which we desire may be where, and as soon as you shall think fit to appoint.

GEORGE LOGAN, Speaker.”<sup>1</sup>

This proposition was not acceded to by Daniel and his Council, and the *Shorham* sailed away to Virginia, with

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<sup>1</sup> S. C. Commons House Journals, No. 5, p. 258 (dated April 17th, 1717).

orders to proceed without delay to England,<sup>1</sup> just at the time when there was most urgent need for her presence on the coast.

But despite their depleted resources and their unprotected state, the colonists were active, and in June, 1717, the Vice-Admiralty Court was again convened, and four pirates, who had been recently taken, were placed on trial for their lives. Stephen James De Cossey, Francis De Mont, Francis Rossoe, and Emanuel Ernanos were convicted of piratically taking the vessels, the *Turtle Dove*, the *Penelope*, and the *Virgin Queen*, in July of the previous year, and having been sentenced to death by Judge Trott, were promptly executed at the hands of the law.<sup>2</sup>

The trials last mentioned were held during the first year of the administration of Governor Robert Johnson, and were the results of the first of a series of operations conducted by that able official, which resulted in the final extermination of piracy as a crime in the Carolinas. Johnson had been commissioned Governor in April, 1717, and no man could have entered upon office under more inauspicious circumstances. The Province was in a deplorable condition, and so serious had the situation become that the inhabitants had already directed a petition to the king, praying to be taken directly under the royal protection. Their repeated complaints to the Proprietors had been either ignored or reproved as the outgrowth of an unruly and factional spirit.<sup>3</sup> The Indian wars had caused the ruin of the planters, and commerce had been almost annihilated by the hordes of pirates who now boldly threw the black flag to the winds of every sea. They had actually colonized the island of New Providence, and for several years had been permitted free access to the Cape Fear and other rivers and inlets of the North Carolina coast, from whence they issued

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<sup>1</sup> Spotswood Letters, Vol. II., p. 246.

<sup>2</sup> S. C. Adm. Court Records, Book A and B.

<sup>3</sup> Rivers, 277.

on lawless cruises, and to which they could retire in security on the first indication of danger.

But the colonies were not to be wholly abandoned to the mercy of their enemies. Although their petitions were ignored with distressing regularity, they had friends who were much nearer to the throne than their agents, who now stepped in with demands which the king could not afford to ignore. In London there was a large and influential class of merchants who had grown rich in the trade with the New World, and it was with no great equanimity of mind that they saw their business being destroyed by the lawless hand of the pirates. They accordingly combined with the masters of their vessels and petitioned the king in council, showing how the trade had been demoralized, and praying for relief.<sup>1</sup> George I. was about this time engaging the power of the British navy in the Baltic in his endeavors to protect his little German Electorate against the threatened movements of Charles XII. of Sweden,<sup>2</sup> and as no vessels were available for the American coast he resorted to a most ignominious expediency. Thinking that some of the pirates might wish to leave off their lawless lives, and that the number could be much reduced if general indemnity were granted, he declared an act of grace which guaranteed a full pardon to all who would surrender to some competent official within twelve months, and take an oath of allegiance and fealty to the Crown. It was not the first time that an English sovereign had resorted to this questionable method of disposing of a special class of criminals, but on this occasion the plan was by no means successful. The pirates were too secure in their lawlessness to leave off their criminal practices when no other inducement than a pardon for past offenses was offered. Governor Johnson did his duty, however. The king's proclamation was published throughout Carolina, and in his zeal to further his Majesty's service he was inclined to

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<sup>1</sup> Hewat, in Carroll, Vol. I., pp. 208-209.

<sup>2</sup> Green, Hist. of the English People, Book VIII., Chap. IV.



go beyond his jurisdiction in extending the offer of pardon. On December 3rd, 1717, in a written message to the Commons House, he made a proposition looking to the reclamation of all Carolinians who had become pirates with their headquarters in other parts of America.

"His Majesty," he said, "being pleased to issue out his Royal Proclamation, extending his pardon to all pirates, that shall lay hold on the same, and surrendering themselves according to the time limited in said proclamation; and we having several of our inhabitants, that unwarily and without due consideration, have engaged in that ill course of life, and are now resident at the Bahama Islands, and other places adjacent, I think it a duty incumbent on me, with all speed to send his Majesty's proclamation thither, to let our people see, that they may return hither again in safety to us, if in time they embrace his Majesty's royal favor; therefore some proper person must be thought of to carry this proclamation to them; and Col. Parris being willing to undertake the same (who is very well known to all the inhabitants of this Province) if you can spare him from the Public business; I shall give him my instructions accordingly."

There is no record that Colonel Parris ever went to the Bahamas, or elsewhere, to promulgate the king's proclamation, and it is probable that the pirates were left to learn of his Majesty's leniency as best they could. It is certain that the Carolinians who had entered upon this "ill course of life" had not done so as "unwarily and without due consideration" as Governor Johnson seemed to think. If they had, there is no doubt that they considered it more carefully afterwards, and concluded they had done quite the right thing. Some few came in to the officials and took the oath, but they were soon back at their old habits,<sup>2</sup> while the great majority of them ignored the offer, and took renewed advantage of every opportunity to plunder the king's commerce, and render the coast dangerous for every kind of craft save an armed ship-of-war.

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<sup>1</sup> S. C. Commons House Journals, No. 5, p. 388.

<sup>2</sup> S. C. Hist. Soc. Coll., Vol. II., p. 257.

Although no armament was available at this time for the protection of Carolina, such pressure was brought to bear on the king that Captain Woodes Rogers was dispatched with several small vessels against New Providence, with instructions to exterminate the pirates in that quarter, and establish a regular government in the island. Rogers arrived at New Providence in July, 1718, and took possession of the colony for the Crown. He found a large number of pirates there, all of whom surrendered and took the oath, except Charles Vane, who pursued a more desperate course. When he heard that Rogers had arrived off the bar, he wrote him a letter offering to surrender on the condition that he would be permitted to dispose of what spoil he had in the manner that suited himself. Receiving no assurances from Rogers, he determined to escape, and attempted to cross the bar. He was met by two of the invading vessels, with whom he exchanged shots, and after several exciting adventures, succeeded in getting safely to sea with ninety men, in a sloop belonging to one of his officers named Yeates, and made for the Carolina coast, where he engaged in several piratical exploits.<sup>1</sup>

Many of the outlaws who were at New Providence surrendered to the new Governor, and in a short time Rogers succeeded in establishing a law-abiding and prosperous colony. But this action on the part of the English authorities, while it did much to relieve the West Indies, greatly aggravated the situation in both North and South Carolina. Finding themselves driven out from New Providence and the Bahamas generally, they had no other convenient rendezvous besides the North Carolina coast, and before many months had passed, they swarmed into the Cape Fear and Pamlico rivers in greater numbers than the government of that weak Province could possibly cope with. How they were expelled from this their last stronghold on the American coast will form the subject of the succeeding chapters.

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<sup>1</sup> Johnson's *History of the Pirates* (Edition 1726), Vol. I., p. 142 *et seq.*

## CHAPTER IV.

While Rogers was on his voyage to New Providence, South Carolina found herself in most distressing straits, and was compelled to submit to the most humiliating insults and outrages from the pirates of the North Carolina coast.

Early in June Edward Thatch,<sup>1</sup> who under the sobriquet of "Black-Beard" had spread terror along the entire North American coast, suddenly appeared off Charles Town with a powerful equipment, and began a series of most flagrant outrages. Thatch had for some time made Ocracoke Inlet, on the North Carolina coast, his chief resort, and "Thatch's Hole," an old landing in that vicinity for many years after his day, recalled to the mariner the time when it was as much as his life was worth for a skipper to venture into those waters unless heavily armed and ready for a desperate fight. When the proclamation of George I. was issued, Thatch and his crew went in to Governor Eden of North Carolina, and in January, 1718, surrendered and took the oath.<sup>2</sup> His men scattered themselves through the country, many of them going north to Pennsylvania. Thatch lingered about his old haunts, but ere long the temptations of the old free life proved too strong for him. Before the end of the winter he was again fitted out from North Carolina, and was once

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<sup>1</sup> Also spelled Teach. Watson says in his *Annals*, Vol. II., p. 220: "I happened to know the fact that Blackbeard, whose family name was given as Teach, was in reality named Drummond, a native of Bristol. I have learned this fact from one of his family and name, of respectable standing in Virginia, near Hampton." I have adopted the spelling of the name used in the contemporary court records. See Howell's *State Trials*, *Trials of Bonnet et al.*, Vol. XV.

<sup>2</sup> See Pollock's *Letter Book*, N. C. Col. Rec., Vol. II., pp. 318-20.

more harrying the coast and capturing vessels of all nationalities. It was during one of these cruises that he visited the Bay of Honduras, where he met Stede Bonnet, late of Barbadoes, and the two returned to Carolina together, taking numerous prizes by the way. Many of the mariners on board the captured vessels entered into the pirate compact, and by the time Thatch reached the South Carolina coast he was in command of a fleet consisting of a ship of more than 40 guns and three attendant sloops, on board of which were above 400 men.<sup>1</sup>

Thatch felt himself strong enough to defy the government, and dropping anchor in front of Charles Town, he commenced operations by capturing the pilot-boat which was stationed on the bar, and within a few days took no less than eight or nine outward-bound vessels.<sup>2</sup> Among these captures was a ship bound for London, carrying a number of Carolina passengers, including Samuel Wragg, a member of the Council of the Province. How the pirates became aware that they had made so distinguished a prisoner is not known, but having ascertained the fact, they determined to make the best of their good fortune. At this time the fleet was in need of certain medicines, and Thatch had his surgeon prepare a list of the desired articles, and proceeded to demand them of Governor Johnson. Arming a boat, he sent it up to the city in command of one of his officers named Richards. The latter was accompanied by two other pirates, and by a Mr. Marks, a citizen of Charles Town, who was ordered to lay the situation before the Governor, and to inform him that if the necessary supplies were not immediately forthcoming, and the men permitted to return unharmed, the heads of Mr. Wragg and the other Charles Town prisoners would be sent in to him.<sup>3</sup>

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 236.

<sup>2</sup> *Ibid.*

<sup>3</sup> Weedin has unintentionally done Governor Johnson an injustice in mentioning this event. He says Thatch "prevailed over the Governor of S. C. so that he obtained a chest of much-needed medi-

Marks was given two days in which to accomplish his mission, and the prisoners, who had been acquainted with the demands and the attached condition, awaited with the most intense anxiety the return of the embassy. Two days passed and the party did not return. Thatch suspected that his men had been seized by the authorities, and notified Wragg that his entire party could prepare for immediate death. He was persuaded, however, to stay his bloody order for at least a day, and while awaiting the expiration of that time a message was received from Marks that their boat had been overturned by a squall, and that after many difficulties and much delay, they had succeeded in reaching Charles Town. This explanation satisfied Thatch and he gave the prisoners the freedom of the vessel until the third day, when, losing patience, he again swore that he would be revenged on the colony for the supposed arrest of his men, by putting Wragg and his fellow-voyagers to an instant death. The prisoners, to save themselves, then offered a desperate condition. Begging for a further reprieve, they agreed to pilot the pirate fleet into the harbor, and assist Thatch in battering down the defenseless town, in the event that proof was brought of the detention of the messengers by the authorities.<sup>1</sup> Nothing would have pleased the pirate chief better than to take so signal a vengeance for what he termed the treachery of the government, and he accordingly acceded to the proposition of the Carolinians and granted a further stay of the execution.

In the meantime Charles Town was in a state of desperation such as had never been known in all its turbulent history. Marks had laid Thatch's demands before the Governor, who recognized the case as one which would require

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cines worth £300 or £400 with provisions for his vessels" (pp. 563-64). The connection in which this statement is made would lead the uninformed reader to suppose Johnson to have been in collusion with Thatch.

<sup>1</sup> Johnson is authority for this statement, but it is not possible to believe that Wragg was a party to the agreement.

the most delicate handling. No time was to be lost; what was done must be done quickly. Although a man of far more than ordinary ability, Johnson decided not to trust his own judgment in the matter, and convening his Council, he laid the situation before it. The members realized that but one course was open to them; the pirates had them at the greatest disadvantage, and the only thing feasible was to accede to their insolent demands, and, if possible, seek to punish their audacity later. The colony was in no condition to repel the invasion at this time. The harbor was wholly unprotected, and there was not an armed vessel within hundreds of miles. The Indian wars had bankrupted the treasury, and it was impossible to arm any of the merchant vessels in the harbor for a movement against the blockading fleet.

In the meantime Richards and his men were parading themselves up and down the principal streets, and their impudent behavior aroused the indignation of the people to the highest pitch. This state of affairs was fraught with the greatest danger, as it was not known at what moment the pirates would be attacked by the infuriated populace, and such action would not only be the death-warrant of Thatch's prisoners, but would in all probability bring the guns of the pirate fleet to bear on the defenseless city.

The action of the Council was as prompt as the exigencies of the occasion demanded. The medicines were prepared without delay, and in a few hours Marks, accompanied by his guard, was on his way to the bar.

His demands being satisfied, and a large quantity of rich spoil having been secured from the captured vessels, Thatch sent Wragg and the rest of the prisoners ashore in a half-naked condition. After suffering numerous hardships they made their way back to Charles Town, glad to escape with their lives.<sup>1</sup> Among Thatch's spoil were \$6000 in specie which he took from Wragg.<sup>2</sup>

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<sup>1</sup> The foregoing account of Thatch's exploits off Charles Town is made up partly from memoranda from MS. records in the London State Paper Office, and partly from Johnson's History. The latter

Among the unfortunates who came so near falling victims to the bloody vengeance of Thatch on this occasion was William Wragg, a son of Samuel Wragg, who was at this time but four years of age, and who afterwards became one of the most distinguished men in the American colonies. He was educated in England, and held many responsible public positions in South Carolina during the period just prior to the Revolution. In 1771 he was tendered the Chief Justiceship of the Province, which he declined. He was a devoted loyalist during the struggle for independence, but such was his character that he retained the highest esteem of his fellow-countrymen. Foreseeing the success of the American arms, he disposed of his Carolina estates and in 1777 sailed for England. His vessel was lost on the coast of Holland in September of that year, and he was drowned with the entire crew. Such was the regard in which he was held that George III. had a memorial erected in Westminster Abbey in his honor.<sup>2</sup>

From Charles Town Thatch went to North Carolina, where he remained for some time in comparative idleness, and it was during this stay that he formed connections with the authorities of that colony which reflect as much dishonor upon its early history as the corrupt administration of Quarry did upon South Carolina thirty years before.

Charles Eden had been appointed Governor of North Carolina early in 1714, and was in charge of the government for eight years. The chief town of the colony was then Bath, in the present county of Beaufort. The country was

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authority the author was inclined to doubt, but on comparing him in several instances with the MS. contemporary records, he was found to be remarkably accurate even in the minutest details. This leads to his being credited, although several seemingly improbable statements which could not be verified have been omitted. See also Howell's State Trials, Vol. XV., Trial of Bonnet et al.

<sup>1</sup> Hawks, Vol. II., p. 274.

<sup>2</sup> Ramsay, Vol. II., p. 532.

thinly settled, and Eden entered upon his office with very large ideas of progress, and could have advanced the prosperity of the colony most materially had he set about it in the right way. North Carolina was then divided into two customs districts, Currituck and Roanoke,<sup>1</sup> but the arrangement was not convenient, and in August, 1716, the Lords Proprietors, on a petition from Eden, constituted Bath a port of entry.<sup>2</sup> This might have indicated an increase of North Carolina's commerce, but whatever the condition was, Governor Eden, during the two years he had been in power, had not succeeded in strengthening the government.<sup>3</sup> The colony had been much reduced by Indian wars, and when Eden assumed power, the pirates had already taken possession of the coast, and there is no record of any attempt being made to drive them out. When Rogers established his government at New Providence they had no other convenient rendezvous than the North Carolina coast, and before many months they came into the Cape Fear and Pamlico rivers in greater numbers than had ever been known before.

Although some of these pirates were men whose names had inspired terror throughout half the world, to Thatch was awarded the distinction of being the most desperate of them all. On returning from Charles Town he disbanded his company, retaining for himself and a few chosen companions a small sloop, which he fitted out for an alleged trading expedition to the island of St. Thomas.<sup>4</sup> In a few weeks, however, he returned to Bath with a large French vessel, loaded with sugar and other merchandise, and going in to the Governor he made an affidavit that he had found it

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<sup>1</sup> N. C. Colonial Records, Vol. II., p. vi.

<sup>2</sup> *Ibid.*

<sup>3</sup> See N. C. Colonial Records, Vol. II., preface, for a statement concerning the weakness of the government.

<sup>4</sup> Although given by several authorities, there is much doubt as to this point. Bonnet undoubtedly cleared for St. Thomas when he took the oath, and it is highly probable that the authorities have confused the two men. See Note 2, p. 90.



abandoned at sea.<sup>1</sup> "Strange ideas were entertained in those days of Admiralty jurisdiction,"<sup>2</sup> and Tobias Knight, the collector of the port, sitting as Vice-Admiralty Judge,<sup>3</sup> condemned the French vessel as a legitimate prize, and permitted Thatch to land the cargo and retain it for his own use. The pirate thereupon discharged the goods, and instead of selling the vessel, which was a valuable one, in order to cover up all traces of his crime, beached her on the coast some little distance from Bath, and burned her.

It was chiefly in connection with this prize that the names of Eden and Knight have been handed down in history besmirched with as much infamy as that which attaches to those of Fletcher and Nicolls in New York, or Quarry in South Carolina. Thatch had for some time been living on terms of great intimacy with many of the principal inhabitants, and was by no means an infrequent visitor at Knight's residence. Being in favor with the officials, he enjoyed a perfect immunity from punishment for the various outrages he perpetrated from time to time on the coastwise shipping. Complaints to the proper authorities were of no avail, and the license he was granted soon made him so reckless and arrogant that he aroused the bitter enmity of many of the inhabitants of Bath and the surrounding country, who might otherwise have joined the authorities in conniving at his residence in the colony. His depredations were extended up the coast as far as Pennsylvania, and on his expeditions to the North he not infrequently made Philadelphia his headquarters. This fact soon became notorious, and in August, 1718, Governor William Keith reported to his Council that he had issued a warrant for his apprehension.<sup>4</sup> Thatch was too shrewd to be taken in any trap, however, and the warrant was never served.

<sup>1</sup> Spotswood's Letters, Vol. II., p. 317.

<sup>2</sup> Hawks, Vol. II., p. 206.

<sup>3</sup> *Ibid.*, pp. 205-206.

<sup>4</sup> Minutes of Provincial Council, Pa., Vol. III., p. 45.

The peculiar circumstances of the taking of a small trading vessel about this time seem to have led Thatch's enemies to look about for some means of ridding the country of his presence. Seeing his intimacy with the North Carolina officials, they realized that they would have to look elsewhere than to their own government for help. Naturally they would have turned to South Carolina, but that colony now had all she could do in attending to her own troubles, and it was useless to apply for assistance there. During recent troubles Governor Spotswood, of Virginia, had rendered the colony valuable services, and it was to him that the North Carolinians now applied for relief. The case of the French prize had by this time become notorious in the Province, and whatever Eden and Knight pretended to think of it, everybody knew it was a clear case of piracy, and that instead of attempting the apprehension of the miscreants, the authorities had connived at their crimes, and had, it was generally believed, been well paid for their connivance.

Affidavits setting forth these facts and the general circumstances were forwarded to Governor Spotswood, and "upon the repeated applications of the trading people" of North Carolina,<sup>1</sup> the Virginia Assembly offered a reward of £100 for the arrest of Thatch, £15 for the arrest of each of his officers, and £10 for each of his crew.<sup>2</sup> Not satisfied with simply offering a reward, however, Spotswood, deeming his own coasts in danger, determined to effect the immediate capture of Thatch and his crew. At this time two British war-vessels, the *Lyme*, Captain Ellis Brand, and the *Pearl*, were stationed in Hampton Roads, and Spotswood, hiring two sloops at his own expense,<sup>3</sup> equipped them and gave them in command of Captain Brand and Lieutenant Maynard, with instructions to repair to the North Carolina coast and bring Thatch and his crew to Virginia dead or alive.<sup>4</sup>

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<sup>1</sup> Spotswood's Letters, Vol. II., p. 273.

<sup>2</sup> Hawks, Vol. II., p. 277.

<sup>3</sup> Spotswood's Letters, Vol. II., p. 305.

<sup>4</sup> The authorities are conflicting on the point of whether or not

The vessels being furnished with North Carolina pilots, they set sail about the middle of November, 1718, and reached Ocracoke Inlet on the 22d. Brand had timed his expedition well, for, as he had hoped, Thatch was at his rendezvous with his crew, which numbered, at this time, not more than twenty men. The pirate had received an intimation from Knight of the intended attack, but he had evidently treated the warning lightly, for he was wholly unprepared for a conflict when the Virginians hove in sight. It did not require many hours for him to make ready for action, however, and when the sloops came within range, having mounted eight guns, he gave them a broadside, which was a decided indication that the capture would be no easy one. In the course of the battle Thatch succeeded in boarding one of the attacking sloops, and although he had a reduced number of men, the Virginians were forced to a desperate resistance, and did not maintain one inch on their decks which was not dearly paid for in blood. Thatch himself attacked Maynard, with whom he maintained a bloody struggle, until a sword-cut across the throat, as he was in the act of emptying his pistol into the breast of the gallant officer, disabled him, and he was promptly dispatched. The Virginians had twelve men killed and twenty-two wounded.<sup>1</sup> Thatch displayed a most desperate courage in the conflict, and, according to Johnson, "stood his ground and fought with great fury till he had received five and twenty wounds and five of them by shot." More than half the pirate crew was killed, and several escaped by jumping overboard and swimming ashore.

From Ocracoke Inlet Brand sailed into Bath with nine prisoners, and on learning that the greater part of the cargo

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Brand accompanied the expedition in person, but, following Spotswood, I think it perfectly safe to say that he did. The order from Eden on Knight regarding the pirates' effects was certainly given to Brand. See Letters, Vol. II., p. 318. Pollock also corroborates Spotswood. See N. C. Col. Rec., Vol. II., p. 319.

<sup>1</sup> Spotswood's Letters, Vol. II., p. 275.

of the French prize was still stored in the town, he demanded that Governor Eden should deliver it into his custody. Eden does not seem at this time to have questioned his right to seize the goods and gave him an order on Knight for their delivery.<sup>1</sup> At first the guilty secretary denied "with many asservations" that any part of the cargo was in his possession, but finding Brand determined, he confessed, and the goods were found concealed in his barn.<sup>2</sup> With Thatch's head suspended from the bowsprit, and the prisoners and the spoil safe in the hold, the Virginians then sailed back home in triumph.

In fitting out this expedition Governor Spotswood was compelled by the nature of the enterprise to observe the strictest secrecy. The officers of the men-of-war were the only persons he acquainted with his design, not even his Council being taken into his confidence.<sup>3</sup> In March of the following year (1719) he made a full report of the matter to the Council, which endorsed his action and ordered the prisoners tried for piracy. The Council was not precipitate in its course, however. They considered postponing action until every member could be present, but it was thought that all doubtful points could be just as well discussed before the court, and the trials were ordered to proceed immediately.<sup>4</sup> They were held at Williamsburgh, and four of the accused were condemned and afterwards hanged.<sup>5</sup>

<sup>1</sup> Spotswood's Letters, Vol. II., p. 318.

<sup>2</sup> N. C. Col. Rec., Vol. II., p. 344.

<sup>3</sup> Spotswood's Letters, Vol. II., p. 274.

<sup>4</sup> N. C. Col. Rec., Vol. II., p. 327.

<sup>5</sup> An attempt to secure some details of these trials from the Virginia Admiralty Court Records proved fruitless. The clerk writes: "The earlier records of this Court are in such a condition that I fear that I cannot give you the information asked for. I cannot even tell whether they go back as far as 1719; they are piled up in heaps in an upper room of the custom house building, and have been in that condition ever since the war. At the evacuation of Richmond in the Great Fire, a large quantity of papers and records of the United States Courts, as well as of the General

The trials are of public interest on account of the efforts made by the North Carolina friends of the pirates to establish their innocence.<sup>1</sup> It seems that when Thatch violated his first pardon, instead of prosecuting him, the North Carolina authorities applied to England for a second dispensation in his favor,<sup>2</sup> and the second pardon was on its way to the Province when Brand went on his expedition.<sup>3</sup> Spotswood showed, however, that his later crimes were committed subsequent to the date of this second pardon.<sup>4</sup> The North Carolina authorities strongly resented Brand's invasion of the Province, and denied Spotswood's right to send the expedition without their permission. The pirates, they claimed, could not be taken to Virginia for trial without a special warrant from the king.<sup>5</sup> Governor Spotswood had very little respect for North Carolina ideas of justice, however, and he not only hanged the convicted pirates, but proceeded to condemn the confiscated property in the courts. In this case the North Carolina officials again entered a vigorous protest, taking exception to the jurisdiction of the court, and demanding that the goods be returned to them for condemnation.<sup>6</sup> This point was promptly overruled, whereupon they threatened to bring suit in England against Captain Brand for trespassing on the possessions of the Lords Proprietors, and Governor Spotswood, in order to protect that officer in case of an adverse issue of such a prosecution,

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Court of the State of Virginia, were totally destroyed. \* \* \* In order to get at the information which you wish it would require a long and tedious search among a mass of dusty and dirty books and papers, with little show of success."

<sup>1</sup> N. C. Col. Rec., Vol. II., p. 327.

<sup>2</sup> The indulgence granted by the Act of Grace expired Jan. 5, 1718, a date prior to Thatch's recent outrages. See opinion on the Act by the Attorney-General of England, N. J. Archives, 1st Series, Vol. IV., p. 329 *et seq.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Spotswood's Letters, Vol. II., p. 319.

<sup>5</sup> See Pollock's Letters in N. C. Col. Rec., Vol. II., pp. 318-20.

<sup>6</sup> Spotswood's Letters, Vol. II., p. 318.

had the proceeds of the sale of the goods sent to England, so as to be ready for the proper persons, should the higher courts reverse the decision of the Virginia tribunals.<sup>1</sup>

The evidence brought out on these trials showed that the North Carolina authorities had been guilty of a most disgraceful participation in the crimes committed by Thatch and his crew. When the pirate chief was killed, among the other papers found on his person was a letter from Knight containing a covert warning of the intended attack from Virginia, and also indicating Governor Eden's interest and friendship,<sup>2</sup> and no doubt was left that both of these officials had entered into a secret business copartnership with the notorious outlaw.

Knight was at this time one of the most prominent men in the colony, and Governor Spotswood, in his reports of the affair to Secretary of State Craggs, in referring to him, called particular attention to the fact of "how dark a part some of their Officers have acted, particularly one who enjoyed the post of Secretary, Chief Justice,<sup>3</sup> one of their Lords'p's Deputys, and Collector of the Customs, [who] held a private Correspondence with Thach, concealed a Robbery he committed in that province, and received and concealed a considerable part of the Cargo of this very French Ship w'ch he knew Thach had no right to give, or he to receive." "But," he concluded, "it would be too tedious to relate how many favourers of Pirats there are in those parts, and even in this Colony, had they power equal to their Inclination."<sup>4</sup>

The chief evidence against Knight was secured from Basilica Hands, one of Thatch's men who had been with him off Charles Town the previous June. Hands was not at

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<sup>1</sup> Spotswood's Letters, Vol. II., p. 318.

<sup>2</sup> Williamson's N. C., Vol. II. Proofs and Explanations Rr.

<sup>3</sup> Knight was Chief Justice for March term, 1718, only. See Hawks, Vol. II., p. 139. Martin says he acted during the absence of Chief Justice Gale.

<sup>4</sup> Spotswood's Letters, Vol. II., p. 319.

Ocracoke when Brand attacked the pirate, but was captured at Bath when Brand went into the port after Thatch's spoil. He had been shot and wounded in a wanton manner by Thatch a few days before, and doubtless a desire for revenge on the pirate crew had much to do with inducing him to turn king's evidence so promptly. He gave an account of how the French vessel had been seized off the Bermudas while bound home from Martinique, and how she had discharged her cargo at Bath, the collector sharing in the spoil. So serious were these charges, and supported as they were by the letter from Knight which was found in Thatch's possession, the Virginia authorities thought it their duty to advise the North Carolina government of the state of affairs which had thus been brought to light. The Vice-Admiralty Court officials were accordingly ordered to have copies of the testimony made and sent to Governor Eden.

Although Eden naturally was not inclined to give the matter a very thorough and unbiased investigation, especially as the charges came from the Virginia authorities, the accusation was too grave a one to be passed by without some official notice. The necessity of passing some judgment on it was also made much more imperative by the fact that Spotswood had sent a full account of the occurrences and the attendant circumstances to the English government, and also to Lord Carteret, one of the Carolina Proprietors, and further connivance of the North Carolina authorities would have been certain to attract the attention of the Proprietors, if not of the high officials of the English government itself. So in April, 1719, the Council of the Province was convened, and the matter laid before it. The Council very properly was not disposed to be hasty, and after hearing the charges, ordered that the papers in the case be served on Knight and that he be summoned to the next meeting to give his defense.<sup>1</sup>

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<sup>1</sup> Council Journals, N. C. Colonial Records, Vol. II., pp. 329-330.

Pursuant to this summons, Knight came before the Council on May 27th. His letter to Thatch was produced and read, and his handwriting identified by comparison with other papers which he had penned.<sup>1</sup> On being called on for his defense, Knight submitted a lengthy remonstrance, denying the allegations contained in the testimony taken in the Virginia court, and explaining that the letter to Thatch had been written in accordance with the orders of Governor Eden. A young man named Edmund Chamberlaine, who resided with Knight, also filed an affidavit in his behalf. It is not related how long the Council deliberated over this weighty matter, but their conclusion can easily be surmised.

"This Board," says the entry in the Council journal, "haveing taken the whole into their Serious Consideration, and it appearing to them that the foure Evidences called by the Names of James Blake, Rich'd Stiles, James White, and Thomas Gates were actually no other than foure negroe Slaves,<sup>2</sup> and since Executed as in the Remonstrances is set forth, and that the other Evidences so far as it relate to the said Tobias Knight are false and malicious, and that he hath behaved himself in that and all other affairs wherein he hath been intrusted as becomes a good and faithful Officer, and thereupon it is the opinion of this Board that he is not guilty, and ought to be acquitted of the s<sup>d</sup> Crimes, and every one of them laid to his charge as afors<sup>d</sup>."<sup>3</sup>

The evidence submitted by Knight in his own defense placed Eden in a most unenviable light, but after the shameful acquittal of the guilty Secretary it is not to be wondered at that no record is found of any proceedings against his equally culpable superior. But the charge which had been preferred against Governor Eden was by no means forgotten, and his complicity in Thatch's crimes has ever re-

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<sup>1</sup> Council Journals, N. C. Colonial Records, Vol. II., pp. 343-4.

<sup>2</sup> "Though cunningly couched under the name of Christians."—Knight's Defense, N. C. Col. Rec., Vol. II., p. 345.

<sup>3</sup> Council Journals, N. C. Colonial Records, Vol. II., p. 349.



mained a blot upon his name. Nor did the better element in North Carolina in his own time fail to be sensible of the ignominy which attached to their government through his conduct. Some time after the occurrences above related, Edward Moseley, a prominent official of the Province, was arrested for forcibly possessing himself of certain records, and he declared with significant sarcasm that the Governor was quite able to effect the arrest of honest gentlemen, but was powerless when it came to apprehending outlawed pirates. Eden was so stung by this charge that he prosecuted Moseley for defamation of character.<sup>1</sup>

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<sup>1</sup> N. C. Col. Rec., Vol. II., p. 359.

## CHAPTER V.

North Carolina and Virginia had by no means the exclusive privilege of dealing with the pirates at this period. While Spotswood was ordering invasions of the North Carolina coast, and Thatch was pursuing his lawless career in the vicinity of Bath, South Carolina was passing through an ordeal never before experienced by an English colony in North America. Governor Johnson, though a man of no mean force, believed, above all things, in invoking the higher authorities whenever the occasion seemed to warrant it. Thatch had hardly gained the security of his North Carolina retreat after so boldly laying Charles Town under tribute, before a letter was speeding across the Atlantic to the British Board of Trade, acquainting it with the unheard-of outrage the infamous "Blackbeard" had perpetrated, and requesting the presence of one or more war vessels for the protection of the city and the adjacent coasts.<sup>1</sup> But, as usual, the petition was pigeon-holed, and the South Carolinians again found their grievances ignored by those from whom they had the right to demand protection.

The summer of 1718 had drifted on without further incident, however, until the autumn, when the products of the Province were being prepared for shipment, and the harbor was full of sail, ready to bear the valuable cargoes to the markets across the water. The pirates evidently knew something of the times and seasons of business in Carolina. Although they sailed boldly up and down the coast from one rendezvous to another, and were prepared to accomplish as much mischief as whim or interest might dictate, during the

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 257.

summer they gave little trouble to the few vessels that sailed with their cargoes of indifferent value between England and Charles Town. As soon as the autumn fell, however, they began to prepare for active operations, and during the months of September and October their career found its culmination in a series of exploits unparalleled in audacity since the days of the previous century, when the buccaneers in the West Indies, under the leadership of the infamous Henry Morgan, held the seas against the combined fleets of the then powerful kingdom of Spain.

In many respects Major Stede Bonnet was the most remarkable of all the notorious sea-robbers of this period. As an old biographer points out, he was the last man who could have been expected to have launched out upon such an abandoned and desperate career.<sup>1</sup> A man past the meridian of life, of good antecedents, possessed of wealth and of a considerable degree of education and refinement, as such accomplishments went in those rude times, there was every reason for him to remain at home and end his days in peace and honor. He had served with some distinction in the army of Barbadoes, had been honorably retired after attaining the rank of major, and was residing at Bridgetown, at peace with all the world and in good favor with the citizens of that thriving colony. Besides this, Bonnet had no knowledge of the sea, and, as will be seen, knew so little of the requirements of a sailor's life that his first experiences resulted only in disaster and misfortune.

Johnson, who seldom has a good word for a pirate under any circumstances, is inclined to pity rather than condemn Bonnet. "This humour of going a-pyrating," he says, "proceeded from a disorder in his mind, which had been but too visible in him some time before this wicked undertaking; and which is said to have been occasioned by some discomforts he found in a married state." Whatever may have been the source of his alleged mental disorder, there was

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<sup>1</sup> Johnson, Vol. I., p. 91.

undoubtedly much well-planned method in his madness, as he soon afterwards showed in his exploits along the American coast.

It was early in the year 1717 that Bonnet put into execution his nefarious designs. Being a man of wealth, he had no difficulty in finding such a vessel and equipment as he desired; and one dark night, in company with a crew of seventy desperate men, he sailed across the Bridgetown bar in a sloop of 10 guns, which he had christened the *Revenge*, a name common in all pirate fleets at that time. Leaving the Barbadoes far to the south, he made directly for the Capes of Virginia, and stationed himself in that great highway of commerce. In a few days he had taken a number of merchant vessels, several of which he burned, after plundering them and sending the crews ashore.

After paying his respects to the commerce of New York and New England in rather an aggressive manner, Bonnet sailed for South Carolina, and came off the bar of Charles Town in August, 1717. Here he anchored, and set a watch for any vessels that might attempt to pass in or out of the port. He had not waited long before a sloop belonging to Barbadoes, Joseph Palmer, master, hove in sight, followed almost immediately by a New England brigantine, under the command of Thomas Porter. The brigantine he sent into Charles Town, after relieving her of all the valuables on board, and the sloop he retained for his own use, after dismissing the crew.

History does not relate what account of his adventure Captain Porter carried into Charles Town, but if any attempt was made to capture the daring freebooter, it proved futile, for the brigantine had scarcely made her way across the bar when Bonnet weighed anchor, set all sail, and shaped his course for the coast of North Carolina, where he could refit his vessel for another cruise. He took the Barbadoes sloop with him, and burned her soon after going into the coast. After refitting the *Revenge*, Bonnet again put to sea, but without any definite determination as to where his

next cruise would be, and it was at this time that his troubles with his crew commenced.

The *Revenge* had not been out from Barbadoes many days before the men discovered his ignorance of nautical affairs, and this discovery engendered a contempt which soon began to display itself openly, and it was only by the influence of his superior courage that Bonnet prevented an open mutiny. The crew was kept quiet by means of determined threats and frequent punishments, and the *Revenge* was now steered for the Bay of Honduras, the great southern pirate rendezvous. Here he met Thatch, the famous "Blackbeard" of North Carolina, and the two entered upon a cruise together. They had not proceeded far before Thatch perceived that his companion knew nothing of seamanship, and deeming him an unsafe man to be in command of so fine a sloop as the *Revenge*, coolly deposed him. Placing Richards, one of his own officers, in charge, he took Bonnet on board of his own vessel, where he gave him a post of ease and security. Bonnet was naturally enraged at this proceeding and chafed under the restraint of his subordinate position, but he was powerless to wreak his revenge. Thatch was all-powerful, and had a desperate crew in sympathy with him, whose contempt of Bonnet was equaled only by their fear of the new commander. The first prize taken by Thatch's newly-organized squadron was the *Adventure* from Jamaica, whose master, David Herriot, was destined to play a tragic part in Bonnet's subsequent career.

Bonnet was in company with Thatch on several cruises, including the celebrated one off Charles Town harbor in June, 1718, after which he sailed in the same fleet to Topsail Inlet, N. C., where the company was disbanded. This was a stroke of excellent fortune of Bonnet, for he was then able to resume command of his own vessel and proceed to sea on his own responsibility. And just at this juncture a combination of circumstances made it possible for him to return to his lawless trade under the most favorable auspices possible.

As we have already learned, George I. had the year before

issued a proclamation of pardon to all pirates who would surrender within twelve months to any qualified officer of the king and take the oath of allegiance; and about the same time war broke out between Spain and the Triple Allies. Bonnet now saw his opportunity to pursue his career, at least for a time, under the color of law, and he was not slow to avail himself of it. Leaving the *Revenge* in command of a subordinate officer, he proceeded to Bath, where he surrendered to Governor Eden, took the oath and received a certificate of pardon. ' At the same time he procured a clearance for his vessel for the island of St. Thomas, announcing his intention of applying for a commission there to privateer against the Spaniards.<sup>1</sup>

Thus armed with proper clearance papers, and a pardon issued by a legally constituted authority in the name of his Majesty, Bonnet was prepared to continue his career of crime and bloodshed under better auspices than those enjoyed by any pirate since the time that Kidd sailed from England with the personal sanction of King William himself. Returning to Topsail Inlet, he rescued a number of sailors who had been marooned by Thatch on a desert island, and shipped them on the *Revenge*, under the pretense of taking them to St. Thomas.<sup>2</sup>

Having thus procured a good crew, he made all preparations to go to sea, but as he was on the point of weighing anchor, he learned from a market-boat that Thatch was at Ocracoke Inlet with a small company of men. Bonnet had never forgiven Thatch for deposing him from the command of the *Revenge*, and there were also many other scores against him which he was anxious to settle. By this time he had attained considerable proficiency in seamanship, and having by his good fighting qualities gained the confidence

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<sup>1</sup> See Howell's State Trials, Vol. XV.

<sup>2</sup> Spotswood, speaking of this expedition, says that it was conducted by "Bonnet Thatch." He evidently confounded the two men. See Vol. II., p. 273.

of his men, he determined to have it out with his old ally. He accordingly set sail for Ocracoke, but he was a few hours too late. Thatch had sailed away, and learning that he had gone up the coast, Bonnet followed fast after him, but his quest was unsuccessful, and after cruising about for a few days he went into the Virginia coast. On this expedition Bonnet appointed David Herriot as sailing master of his sloop. Herriot joined Thatch when his vessel, the *Adventure*, was taken in the Bay of Honduras, and he now had become one of Bonnet's most valuable lieutenants.

Bonnet at this time seems to have feared the consequences of his acts if he were captured under his own name, and he therefore styled himself "Captain Thomas," by which name he was afterwards known to his crew. He also changed the name of his vessel, and, as if to defy the English authority to the utmost, called her the *Royal James*, in honor of the Chevalier de St. George, the son of James II., who was at that time on the Continent plotting against the throne.

Having thus prepared himself for the most desperate enterprises, Bonnet boldly announced his true intentions to the crew, and declared his determination to sail up the coast toward New England in search of booty. His announcement was a surprise to some of the men,<sup>1</sup> but no loud demurrers were entered. In those times there was little difference between a pirate and a privateer, and the sailor who shipped on a vessel of the latter class suffered few pangs of conscience when the exigencies of the occasion required him to fight under the black flag.

After committing several piracies on the Virginia coast, Bonnet sailed to Delaware Bay, taking several valuable merchantmen and terrorizing the whole coast, the inhabitants of which were unable to send any force against him. There seems to have been some little show of hostility at Port Lewis, for when he wished to put some prisoners ashore

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<sup>1</sup> See testimony in Howell's *State Trials*, Vol. XV., where the trial of Bonnet and his crew is reported, pp. 1231-1302.

there, he first sent a savage message to the inhabitants, threatening to burn the town if his men were interfered with when they landed.

The only captures made by Bonnet in Delaware Bay in which we are interested are those of the sloop Francis, Captain Peter Manewaring, and the sloop Fortune, Captain Thomas Read. These captures were profitable ones, and, apparently satisfied with the results of this cruise, he proceeded to return to Cape Fear, bringing with him the two sloops and their cargoes. The voyage was uneventful, nothing of interest happening, except on one occasion when the Francis was sailing at too great a distance from the Royal James, Bonnet ordered her to stand nearer in or he would scuttle her with a broadside.<sup>1</sup> This threat kept both the prizes, which were manned by their own crews, near enough to the pirate to preclude all possibility of their escape.

The fleet arrived at Cape Fear in August, 1718, and Bonnet immediately set his men to overhauling and repairing the sloop for another cruise. The Royal James proved to be very leaky, and the pirates found they would be detained for a much longer time than they had anticipated. It is highly probable, however, that they would have been permitted to leave Cape Fear without molestation had they not, in their haste to supply themselves with building material, captured a small shallop, which they broke up and used in repairing the Royal James. Soon after this vessel was taken, it was noised abroad that a pirate was rendezvousing at Cape Fear, and in a few weeks the intelligence had traveled as far south as Charles Town, where the government, since the experience of the preceding June, was determined to expend its every energy to keep the freebooters off the coast. As we have already seen, Charles Town had suffered severely from the insolence of the pirates, and the people

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<sup>1</sup> Testimony of James Killing, in Howell's *State Trials*, Vol. XV., p. 1253.



were naturally alarmed lest another descent should be made on the bar. The naval force of the Province was in a very weak condition at this time, no war-vessels being stationed anywhere on this part of the coast, and Governor Johnson was at a great loss to know how to rid himself of the threatened invasion.

But the man was not wanting to the occasion. Colonel William Rhett, a gentleman of fortune and distinction in the colony, who at this time occupied the post of Receiver-General of the Province, waited upon the Governor and asked permission to fit out two vessels against the pirate, who, rumor said, was in fighting trim with a sloop of 10 guns and a hardy crew of sixty men. Accordingly a commission was issued to Rhett, and he pressed into service two sloops, the *Henry*, Captain John Masters, and the *Sea Nymph*, Captain Fayrer Hall. The *Henry*, the largest vessel of the two, was fitted with 8 guns and seventy men, and was selected by Rhett as his flag-ship on the expedition. The *Sea Nymph* carried the same number of guns and sixty men.

On September 10th Colonel Rhett went on board the *Henry*, and the two vessels sailed across the harbor to Sullivan's Island, where the final preparations for the voyage to Cape Fear were completed. But just as he was about to weigh anchor the plan of his voyage was suddenly interrupted by a piece of startling intelligence. A small sloop, with one Cook in command, belonging to Antigua, came into port and reported that she had been overhauled and plundered by no less infamous a pirate than Charles Vane, who lay in front of the harbor with a brigantine of 12 guns and ninety men. Cook also reported that Vane had captured two other vessels bound for Charles Town, one a Barbadoes sloop, Captain Dill commanding, and the other a brigantine from the Guinea coast with a cargo of over ninety negroes. The negroes had been removed from the brigantine and placed on board of a sloop commanded by the pirate Yeates, which Vane had been using as a tender. Yeates, finding himself in charge of a good sloop with sev-

eral guns, a crew of fifteen men and a valuable cargo, determined to part company with Vane. Accordingly he shipped his anchor at midnight and sailed away to the south. Vane discovered the treachery before many hours, and was soon in hot pursuit, but finding no traces of the fugitive, he had returned to Charles Town just in time to intercept four vessels bound out for London. Two of these escaped and continued their voyage, but the Neptune, Captain King, carrying 16 guns, and the Emperor, Captain Power, with 10 guns, were both taken with valuable cargoes.

Such was the account of Vane's depredations as brought in by Cook, and the news was certainly of sufficient gravity to startle the town and rouse the inhabitants to a high pitch of anxiety. But it could not have come at a more opportune time. Rhett's fleet was ready to sail at a moment's notice, and orders were immediately issued to him to abandon the Cape Fear expedition temporarily, and proceed without delay to meet this more pressing danger.

On September 15th Rhett crossed the bar, and having learned from Cook that Vane had intended going into an inlet to the south to repair his vessel, he stood down the coast for several leagues, scouring the rivers and creeks, but without success. Vane evidently feared that Cook's accounts would bring out a force against him, and he made off in safety long before Rhett got to sea. The latter spent several days in his search for the enemy, but finding no signs of him, and believing all danger from this quarter to be past, he proceeded to the execution of his original design, without returning to make a report to Governor Johnson.

In the meantime Charles Town had again been thrown into a state of agitation by the news of the landing of some pirates some distance to the south. This intelligence was brought by no other than one of the pirate crew, and when it was learned that such a character had arrived and requested an audience with the Governor, the people, remembering a similar embassy which had been sent in by Thatch some months previous, were seized with great consternation. It

was soon learned, however, that the pirate's errand was a peaceful one. He informed Governor Johnson that Yeates, who had escaped from Vane, had put into North Edisto river with his cargo of negroes, and wished to know if pardon would be granted him and his crew if they came to the city, delivered up the negroes and took the oath of allegiance. An affirmative reply was returned, and shortly afterwards Yeates and his fifteen men came in with the negroes, delivered them to the authorities and received their certificates of pardon.<sup>1</sup>

Rhett sailed for Cape Fear about September 20th. He must have spent some time in exploring the coast for Vane as he sailed along, for it was not until the evening of the 26th that he sighted the great headland from which North Carolina's chief river derives its name. The mouth of the stream was obstructed by sand-bars which could not be crossed with safety without the assistance of an experienced pilot. The merchantmen of Charles Town did no trading with the North Carolina coast and knew little or nothing of its shoals and bars, and the pilot whose services Rhett had engaged seems to have had no knowledge whatever of the channel. The sloops had scarcely entered the mouth of the river when both ran aground, but not before they had sighted the topmasts of the pirate and his two prizes over a point of land some distance up the stream. Rhett could not get his vessels afloat until late in the night, and was therefore compelled to wait for dawn before making any hostile movement.

The pirates in the meantime were not idle. They knew that their position was not one of perfect security, and the sentinel who was posted to guard against sudden attack reported the appearance of Rhett's fleet immediately after it

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<sup>1</sup> From scattered notices in various authorities it seems that the North Edisto below Charleston and its vicinity was in a small way quite a pirate rendezvous. See Minutes, Provincial Council of Pa., Vol. III., p. 42, for narrative of Richard Appleton et al., whose vessel was fitted from there.

crossed the bar. In the growing dusk it was impossible to distinguish whether or not they were merchantmen, and Bonnet, or Thomas, as he now called himself, manned three armed boats and sent them down to reconnoitre. They had not come within gunshot before they perceived with what manner of craft they had to deal, and hastening back to the *Royal James*, they reported the result of their observations.

Bonnet was not slow to realize that the break of day would bring on a fight that would be to the death. The government of South Carolina would not have sent an expedition such a distance against him unless it was equipped for desperate work, and he began preparations for the heaviest combat his lawless life had yet engaged him in. All night the crew, incited to constant vigilance and unceasing labor by alternate threats and promises, worked, clearing the decks, and making ready for action.

On board the *Henry* and the *Sea Nymph* no less active preparations were in progress. Rhett and his men knew that defeat would mean instant death at the hands of the infuriated outlaws, and they were determined to make use of every advantage that superior equipment would give them. When Bonnet's boats came down the river early in the evening, the South Carolinians anticipated an immediate attack, and fearing that the attempt might be renewed, they lay on their arms all night, maintaining the strictest watch to avoid a surprise.

All through the long hours the sounds of preparation could be heard from the pirate sloop, and the dawn of Saturday, September 27th, disclosed a scene of activity such as had never before been witnessed in those secluded waters. The crews of none of the vessels had slept during the night, and when the first glimpse of day shone in the east, both parties were ready to enter the fight at a moment's notice. The sun had barely risen above the headlands which command the entrance to the river when the South Carolinians, looking across the point of land behind which the pirates lay, saw the sails of the *Royal James* being run up the masts

and heard the rattle of the chains as the anchors were hoisted to the deck. A minute later the pirate craft swung around before the breeze which was blowing straight from off the land, and with all sail set, came flying down the river past the place where the two sloops lay at anchor.

Bonnet's design was evident. He saw that his opponents outnumbered him two to one,, and he determined to resort to the favorite pirate method of defense, and maintain a running conflict, trusting to the chances of escape that would be afforded him could he reach the open sea. Rhett divined his purpose, and both sloops weighed anchor and made for him as he rounded the sheltering point of land. Taking a position on either quarter of the *Royal James* with a view to boarding, the *Henry* and the *Sea Nymph* bore down in such a direction as to force Bonnet to steer close to the shore. Rhett had planned this movement without any knowledge of the river, and it proved as disastrous to his own vessels as to that of the enemy. In a few minutes the *Royal James* was aground, and the attacking sloops, unable to come about with sufficient dispatch, ran into the same shoal water and were soon hard and fast on the sandy bottom of the channel. The *Henry* grounded within pistol-shot of the pirate, on the latter's bow, while the *Sea Nymph*, in her endeavor to cut off the flight, struck the bank so far ahead as to be completely out of range, and was of no service until five hours later when she floated off on the rising tide.

As soon as it was found impossible to get the *Henry* afloat, Colonel Rhett gave orders for a heavy fire to be opened, and the ten guns with which the sloop was manned began pouring their broadsides into the pirate, while the crew kept up a continual fire with small arms which did almost as much execution as the heavier fire from the deck. During this part of the fight the South Carolinians were at a tremendous disadvantage. When the *Henry* and the *Royal James* went aground, both careened in the same direction, so that the deck of the pirate was turned away from the *Henry*, while every foot of the latter's deck was mercilessly

exposed. The heavy shot from the South Carolinians could only take effect on the hull of the pirate, while their own deck could be swept from end to end at every discharge. Lying in these positions, the two vessels maintained for five hours a continuous and bloody contest. The South Carolinians, though under the most trying conditions, conducted themselves with the most dauntless courage. Exposed as was their position, it seemed certain death to attempt to man the guns; but notwithstanding this, every man stood to his post without a thought of flinching, and the conflict was not permitted to languish for a single moment.

The pirates saw their advantage from the beginning and availed themselves of it in every possible way. For some time it seemed certain that the victory would be theirs, and in spite of the spirit displayed by Rhett and his men, Bonnet considered it but a matter of a few hours when the pirate ensign would triumph over the colors of the King. They "made a wiff in their bloody flag," says a contemporary account, "and beckoned with their hats in derision to our people to come on board them; which they only answered with cheerful huzzas and told them it would soon be their turn."

Both sides were confident, but the pirates, who enjoyed such an advantage at the beginning of the conflict, had a desperate disappointment in store for them. The issue of the battle now depended on the tide; victory would without any doubt be with the party whose vessel was first afloat. For five hours the flood poured up the river, and it was late in

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<sup>1</sup> This account of Rhett's expedition and of the subsequent occurrences is taken from a pamphlet written from Charles Town and published in London in 1719, entitled "Tryals of Major Stede Bonnet and Other Pirates." It gives a minute account of the circumstances of the capture, and furnishes a stenographic report of the trial and condemnation of the pirates. The account of these trials given by Howell, Vol. XV., is evidently largely taken from this pamphlet. Through the courtesy of Mr. Daniel Ravenel of Charleston, I have been enabled to make full extracts from this rare publication.

the day before it was high enough to lift the sloops from their stranded positions. The pirates understood the situation fully, and one can imagine the consternation which seized upon the crew of the *Royal James* when they saw the *Henry* slowly righting herself as the rising flood swept higher and higher around her bows. Many of the crew declared for an immediate surrender, but Bonnet refused to listen to such counsel. Under the stress of excitement, the courage which failed him so ignominiously at the last was roused to a desperate pitch. He swore he would fire the ship's magazine and send the entire crew to the bottom before he would submit, and, drawing his pistols, he threatened to scatter the deck with the brains of any man who would not resist to the last, should Rhett attempt to come on board.<sup>1</sup> Bonnet's rage did not avail, however. There were spirits in his crew as determined as he, who preferred to take the chances of a trial, or a pardon, than to brave the death that a further resistance would immediately incur, and surrender was determined upon.

While the pirates were angrily debating the course they should pursue, Rhett set his crew to work and temporarily repaired the damage sustained by the rigging; and assuring himself that the hull of the *Henry* was intact, he stood for the *Royal James* with the intention of boarding her promptly, if this should be necessary to force a surrender. At this juncture, however, a flag of truce was received, and after a few minutes' negotiations the *Royal James* surrendered unconditionally. On boarding her, Rhett, who had not known who was the pirate chief, was surprised to learn that his captive—Captain Thomas, as he was styled—was none other than the notorious Stede Bonnet, whose name was known along the coast of every colony from Jamaica to Newfoundland.

As the *Henry* had borne the brunt of the fight, her loss was far greater than that of her companion sloop. She had

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<sup>1</sup> See testimony of Ignatius Pell, Howell, Vol. XV., p. 1271.

ten men killed and fourteen wounded, several of whom died subsequently of their injuries. The *Sea Nymph* had two killed and four wounded.<sup>1</sup> The pirates, in consequence of their sheltered position, suffered much less severely. Seven of the crew were killed and five wounded, two of whom died soon afterwards.

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<sup>1</sup> Judge Trott, in passing sentence upon Bonnet, stated that 18 South Carolinians had lost their lives in this expedition. There is a tradition that Rhett was shot through the body, but his active participation in the recapture of Bonnet three weeks later seems to indicate this to be an error. See Rivers, p. 285.



## CHAPTER VI.

When the struggle of the 27th was at an end, and Rhett examined his little fleet, he found that it had been much injured by the pirate guns and would require considerable repair before it could be trusted to stand the return voyage down the coast to Charles Town. He accordingly remained at Cape Fear for three days, and on September 30th, with the *Fortune* and the *Francis* and the pirate sloop as prizes, sailed for Charles Town, where he arrived on October 3d, "to the great joy of the whole Province."

Two days later Bonnet and his crew of over thirty men were landed, and delivered into the custody of Captain Nathaniel Partridge, the provost-marshal of the Province. Charles Town did not at this early period of her history boast a prison—although that by no means indicated a lack of crime in the colony—and the pirates were placed under a heavy military guard and confined in the public watch-house. Major Bonnet, however, fared somewhat better. It was generally known that he was a gentleman by birth, and the officials were inclined to treat him with a degree of consideration not accorded to common criminals, but which was soon found to be indeed ill-advised. The confinement at the watch-house was very severe, and the authorities agreed to permit Bonnet to remain in the custody of the marshal, at the latter's residence, two sentinels being placed around the house every evening at sunset.<sup>1</sup> A few days later David Herriot, the sailing-master, and Ignatius Pell, the boatswain, of the *Royal James*, who had agreed to become evidence for the Crown, were also removed to the residence of the marshal.<sup>2</sup>

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<sup>1</sup> Preface, *Tryals of Major Stede Bonnet and other Pirates.*

<sup>2</sup> *Ibid.*

What hitch there could have been in the law concerning the trial of pirates in Charles Town is not known, but on October 17th the Assembly, which was in session at the Parsonage House of St. Philip's Parish, passed "An Act for the more speedy and regular trial of pirates." The preamble of this act set forth that "divers great disorders, wicked practices, treasons, murders, robberies, depredations, and confederacies, have been lately committed in and upon the seas by those called pirates," and that "the numbers of them are of late very much increased, and their insolencies [become] so great that unless some remedy be provided to suppress them, . . . trade and navigation into remote parts will very much suffer thereby." The act was very little more than a re-enactment of the statute of 28 Henry VIII., but it indicated a determination on the part of the government to use every endeavor to punish the pirates, and to go about it in a strictly legal manner.

When one considers the repeated and flagrant outrages which had been perpetrated upon the Province, and upon the port of Charles Town especially, by Bonnet and his fellows, it is hard to believe that these men could have found friends in the city; but to the shame of the people such a fact must be recorded. Friends they had, and friends strong enough and numerous enough to be of very effective force in thwarting the officers of the law in the discharge of their duty. The date set for the trials before the Vice-Admiralty Court was yet four weeks off, and this gave their sympathizers ample time in which to prepare plans for their release. Unfortunately there are no records existing which give an account of the disturbances made in Charles Town during this interval. We only know of them from passing references which we find in the history of the trials,<sup>2</sup> which has

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<sup>1</sup> 3 S. C. Stats., p. 41. To this act were also attached two lists of names of citizens from which the grand and petit juries were to be drawn at the approaching session of the Vice-Admiralty Court.

<sup>2</sup> See Ass't Att'y Gen. Hepworth's speech to the jury. Howell, Vol. XV., pp. 1248-9.

been preserved in minute detail. The result of these disturbances we do know, however.

After terrorizing the good people of the city for several weeks, Bonnet's friends proceeded to try their influence and the influence of pirate gold on the sentinels who were posted about the marshal's house. Their efforts were thoroughly successful, and on the morning of October 25th, three days before the date set for the trial, the city was startled by the intelligence that Bonnet and Herriot had escaped during the previous night and had fled from the city for parts unknown. Ignatius Pell, who was still in custody, told an interesting story of how they had attempted to induce him to fly with them and how his superior virtue had withstood the temptation.<sup>1</sup> But Pell's story threw but little light on the real situation. The two chief desperadoes had escaped, but through whose instrumentality no one knew save those whose self-interest prompted them to be silent. Corruption was undoubtedly at the bottom of it, and although Captain Partridge's name is not connected with the treachery by any of the authorities, the fact that he was superseded a few days later by Thomas Conyers, indicates quite strongly that he knew more about the matter than the Governor thought was consistent with the honest discharge of duty.

But the manner of escape was now wholly a subordinate matter. The pressing necessity was to recapture Bonnet and Herriot before they could make their way to North Carolina, and enter again upon their career of crime. Governor Johnson, with his usual promptness, issued a proclamation offering a reward of £700 for the capture of the fugitives. "Hue and cry and expresses by land and water" were made throughout the Province, the coast being scoured both to the north and to the south in hopes of discovering them.

Bonnet, on effecting his escape, was joined by a number of his friends who had previously procured a boat, and to-

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<sup>1</sup> Preface, Tryals of Major Stede Bonnet, etc.

gether they sailed northward along the coast. The weather was very unfavorable, however, and after contending with adverse winds for several days, they were forced to return to Sullivan's Island in order to procure supplies from Charles Town. They had scarcely landed on the island, which is just opposite the city and but a few miles distant, when word was brought to Johnson of their arrival. He immediately detailed the bold Rhett with a detachment of picked men to attack and, if possible, bring the pirates back to prison alive. Rhett sailed from Charles Town in the night, and after searching for several hours among the forests of low myrtle which covered the sand-hills on the upper end of the island, came upon Bonnet and his party. Rhett's men promptly opened fire, and Herriot was instantly killed, and a negro and an Indian belonging to the company severely wounded. Bonnet thereupon surrendered, and the next day, November 6th, Rhett returned to Charles Town with his prisoner, who was placed in safe confinement to await his trial.<sup>1</sup>

In the meantime, on October 28th, the Court of Vice-Admiralty had been convened at the house of Garrett Vanelsein in Charles Town, and the men who had made such a desperate resistance at Cape Fear were put on trial for their lives. This court was one of the most remarkable that had ever been convened in the Province. Nicholas Trott, Judge in Vice-Admiralty, member of the Council and Chief Justice of the Province, presided, assisted by the following distinguished citizens, who, according to the law of that time, were not members of the bar: George Logan, Esq., Speaker of the Lower House of the Assembly and late member of the Council; Ralph Izard, Esq.; Colonel Alexander Paris, who played so important a part in the revolution of the succeeding year; Captain Philip Dawes, George Chicken, Benjamin De La Conscience, Esq., who, later in life, held a high position in the judiciary of the Province;<sup>2</sup> William

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<sup>1</sup> Preface, *Tryals of Major Stede Bonnet*, etc.

<sup>2</sup> 1 S. C. Stats., p. 439.

Cattle, Esq., Samuel Dean, Esq., Edward Brailsford, Merchant; John Croft, Gent.; Captain Arthur Loan, of the ship *Mediterranean*, and Captain John Watkinson, of the King *William*.<sup>1</sup>

After the reading of the commissions of the judges, the grand jury was sworn, and Judge Trott proceeded to deliver his charge regarding the cases of piracy which were about to be considered. This charge is an interesting and unique paper, giving a complete synopsis of the law against piracy and all kindred crimes. It is replete with quotations from, and references to, many of the most ancient English commentators, and evinces an erudition which would be considered remarkable at any period.<sup>2</sup>

The prosecution was conducted by Richard Allein, the Attorney-General of the Province, assisted by Thomas Hepworth. Both of these gentlemen were distinguished at the bar, and both rose to the position of Chief Justice in after years, Allein holding that post twice. He succeeded Judge Trott in 1719, and was again raised to this dignity in 1727.<sup>3</sup> After the usual preliminaries, two indictments were given out, and the grand jury returned true bills against the following for piracy committed on the sloops *Francis* and *Fortune*:

Stede Bonnet, Robert Tucker, Edward Robinson, Neal Patterson, William Scott, Job Bailey, John Brierly, Robert Boyd, Rowland Sharp, Jonathan Clarke, Thomas Gerrard, David Herriot, John William Smith, Thomas Carman, John Thomas, William Morrison, William Livers, Samuel Booth, William Hewett, John Levit, William Eddy, Alexander

<sup>1</sup> S. C. Adm. Court Records, Book A and B.

<sup>2</sup> Howell, *State Trials*, Vol. XV.

<sup>3</sup> The name of Thomas Hepworth does not appear as Chief Justice in the list given in the S. C. Stats. (Vol. I., p. 439). My authority here is the MS. Hist. of S. C. by General Edw. McCrady, which I consider the best existing authority on colonial history. Through the courtesy of the author I have been permitted to peruse several chapters of this work. Hepworth, according to him, was C. J. from 1724 to 1727, when Allein was again honored with the post.

Amand, George Ross, George Dunkin, Thomas Nicholls, John Ridge, Mathew King, Daniel Perry, Henry Virgin, James Robbins, James Mullet, Thomas Price, John Lopez, Zachariah Long, and James Wilson.

The case for the Crown was laid before the jury by the Attorney-General, who, in an address of some length, summed up the results of the late piratical operations of which the Carolina coast had been the scene. "If a stop be not put to these depredations, and our trade no better protected," he said, "not only Carolina, but all the English plantations in America will be totally ruined in a very short time." He pointed out how Jamaica had already been ruined by pirates, reviewed the extraordinary circumstances connected with the visit of Thatch, and denounced "the most unheard-of impudence" of Richards, and Thatch's other messengers, who "walked upon the Bay<sup>2</sup> and in our public streets to and fro in the face of all the people," while awaiting the Council's reply to the pirate's demand for tribute. The exhibition of sympathy for Bonnet, whom he denounced as the "Archipirata," excited his peculiar abhorrence. "Who can think of it," he exclaimed, "when you see your fellow-townsmen, some dead, and others daily bleeding and dying before your eyes!"<sup>3</sup>

Hepworth followed Allein with a more detailed account of the disturbances which the friends of the pirates had caused in the city. "I believe you cannot forget," he said, "how long this town has labored under the fatigue of watching them, and what disturbances were lately made with a design to release them, and what arts and practices have lately been made use of and effected for the escape of Bonnet, their ringleader; the consideration of which shows how necessary it is that the law be speedily executed on them, to

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<sup>1</sup> Howell's State Trials, Vol. XV., Trial of Bonnet et al., pp. 1243-44.

<sup>2</sup> East Bay street, commonly known as "the Bay," was then as now the street upon which all business connected with shipping was transacted, all the wharves running back to it from the water.

<sup>3</sup> Howell, Vol. XV., p. 1246.

the terror of others and for the security of our own lives, which we were apparently in danger of losing in the late disturbance when under a notion of the honour of Carolina they threatened to set the town on fire about our ears."<sup>1</sup>

The court then proceeded with the trial of all the accused, except Bonnet and Herriot, who were still at large. The testimony given by Pell, the boatswain, was not voluminous, but it was to the point. He detailed with great brevity the story of the capture of the sloops the *Francis* and the *Fortune*, and gave some evidence about the taking of five vessels off Charles Town by Thatch and Bonnet, in the capture of which all the accused had participated.<sup>2</sup>

The defendants were not represented by counsel. While the old law had long since been abrogated, the members of the South Carolina bar still deemed it "a base and vile thing to plead for money or reward,"<sup>3</sup> and it is not surprising that no one was found who would undertake the cause of the accused from feelings of personal interest. The prisoners made practically no defense, all of them claiming that they had been forced into piracy, but Judge Trott, in that arbitrary manner which brought him to grief a year later, cut short their protestations of innocence, and denounced them from the bench in a style that would justify one in thinking that he had been trained in the school of Jeffries during the days of his bloodiest assizes. All of the accused were found guilty except Gerrard, Sharp, Nichols and Clarke, and Judge Trott, in a lengthy discourse on the enormity of their crimes, sentenced them to death. The manuscript of this sentence is preserved in the Charleston Library and is one of the most unique documents of the colonial period now in existence. It is interspersed with innumerable Scripture references and quotations, and the annotations show a familiarity with both ancient and modern authorities rarely to be found even among jurists of acknowledged learning and ability.

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<sup>1</sup> Howell, Vol. XV., pp. 1248-49.

<sup>2</sup> *Ibid.*

<sup>3</sup> Fundamental Constitutions, LXX.

On November 8th, two days after Bonnet's recapture and return to prison, the condemned men were hanged at White Point, and their bodies buried in the marsh below the low-water mark. The exact spot of execution is not known at the present day, as the city has long since grown beyond the ancient low-tide marks, and old White Point, with its numerous creeks and desolate mud-flats, is now occupied by a populous and fashionable portion of Charleston. Tradition has it that the execution was held at a place now in Meeting street near the corner of Water, a few hundred yards below the historic St. Michael's Church, and nearly a quarter of a mile from the beautiful White Point Garden and the sea-side promenade which now marks the southern boundary of the city.

Two days after the tragic scene at White Point, Stede Bonnet was arraigned at the bar to answer for his many crimes. The same judges and the same prosecuting attorneys were present in this case, which lasted through several days. Judge Trott, whose tyrannical conduct on the bench has become a part of South Carolina's history, made short shrift of Bonnet and his defense, but despite the overbearing attitude of the court, the old Barbadoes soldier, steeped to the lips as he was in vice and crime, maintained his dignity through it all, and while conducting himself with the greatest courtesy, declined to be browbeaten by either court or counsel.<sup>1</sup> When he was brought back to Charles Town and learned the fate of his companions he evidently abandoned all hope of escape, and attempted comparatively little defense, listening with perfect composure to the scathing denunciations of the Attorney-General, and the damaging charges of the court to the jury. He made no attempt to excuse himself for his flight from prison, but passed all references to it in silence.

To preclude any possibility of his escaping justice—for his friends were still active and were using every means to

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<sup>1</sup> See Howell for Bonnet's defense.



secure his acquittal—the Attorney-General brought two separate indictments against Bonnet, to both of which he pleaded not guilty. The first trial was on the charge of taking the Francis, and after hearing the same testimony as was submitted in the trial of the crew, the jury rendered a prompt verdict of guilty. On the announcement of this decision Bonnet withdrew his plea in regard to the Fortune, and entering one of guilty, received the death sentence from Judge Trott. This sentence, which has also been preserved,<sup>1</sup> is on a par with the other papers which have been handed down from that learned jurist. He did not spare the prisoner in his denunciations, and for his benefit painted the horrors of eternal punishment in a frightful detail which would be considered barbarous and brutal in these more civilized times. “Consider,” he said to the condemned culprit, “that death is not the only punishment due to murderers, for they are threatened to have their part in the lake which burneth with fire and brimstone, which is the second death,—Rev. 21. 8. See chapter 22. 15.—words which carry that terror with them, that considering your circumstances and your guilt, surely the sound of them must make you tremble, for who can dwell with everlasting burnings?—chap. 33. 14.” After administering these comfortable words to the poor wretch, giving him, at the same time, his scriptural authorities with great scrupulousness, Trott informed him that all this was his duty to him “as a Christian.” Before concluding, he reviewed in brief the prisoner’s past life, the advantages of education and training he had enjoyed, and assigned what he considered the cause of Bonnet’s downfall. “I have just reason to fear,” he said, “that the principles of religion that had been instilled into you by your education have been at least corrupted, if not entirely defaced, by the skepticism and infidelity of this wicked age; and that what time you allowed for study was rather applied

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<sup>1</sup> See “The Tryals of Major Stede Bonnet and the Pirates.” Also Howell, Vol. XV., pp. 1298-1302.

to the polite literature and vain philosophy of the times than a serious searching after the law and will of God."

Trott having sentenced Bonnet to death, it remained with Governor Johnson to name the day of execution, and December 10th was selected. Although the prisoner had borne up under his sentence with great resolution, long before the fatal day arrived he resigned himself to a state of abject terror and agony that little comported with his firm attitude on the trial. It is said that so unnerved was he by the prospect of death "that he was scarce sensible when he came to the place of execution." Despite the desperate character of the culprit, so pitiful was his behavior that the sympathies of the public were greatly aroused in his behalf, and much pressure was brought to bear on Governor Johnson to induce him to grant either a pardon or a commutation of his sentence. Bonnet himself was desirous of being carried to England so as to have his case brought directly to the attention of the king, and he wrote a letter to Colonel Rhett, imploring him to use his influence with the Governor to procure such a dispensation in his favor.<sup>2</sup> Colonel Rhett's reply is not preserved, but he is said to have taken such an interest in Bonnet as to offer to carry him to England,<sup>3</sup> and ample security was offered for the Major's safe delivery to the home authorities.<sup>4</sup> But Johnson knew what the Province had suffered at the hands of the pirates, and he would listen to no proposition to parley with them or their friends. He had no sympathy with the movement to procure a stay of Bonnet's execution, and was unswerving in his determination that the arch-pirate should die in accordance with the sentence of the court. It is possible that had he not made so desperate an effort to escape the government might have been induced to ameliorate his punishment, but he was considered too dangerous a criminal to deal with in any but the most relentless manner. Herriot, who had been killed on

<sup>1</sup> Johnson, Vol. II., p. 320.

<sup>2</sup> Ramsay, Vol. I., p. 204.

<sup>3</sup> Johnson, Vol. II., p. 320.

<sup>4</sup> *Ibid.*

Sullivan's Island, had been persuaded to renounce his old companionship and appear as king's evidence, and the fact that Bonnet had succeeded in again corrupting him was one that especially aroused the indignation of the officers of the law, and made them unyielding in their determination that Bonnet should have justice meted out to him, untempered with mercy.<sup>1</sup>

A piece of evidence which had been furnished by Captain Manewaring of the *Francis*, also had an undoubted influence with the Governor, as showing Bonnet's real feeling toward the Province. On the night before the battle at Cape Fear, while his men were busy preparing for the conflict, he addressed a letter to Governor Johnson, which he showed to Manewaring. This letter—which it is needless to say was never sent—was very insulting in its tone, and declared that if the sloops which had just appeared had been sent out against him, he would, in case he effected his escape, burn or otherwise destroy all vessels he could intercept coming in or going out of Charles Town.<sup>2</sup> To have shown mercy to such a man would have been a public crime, and Bonnet was hanged in accordance with his sentence, and his body buried with those of his companions in guilt, within the flowing of the sea which had witnessed so many of his dark and bloody crimes.

A few days before his execution he addressed a letter to Governor Johnson, in which he begged most piteously for mercy, pleading the ridiculous excuse that his crimes had been committed under compulsion. This letter was published by Captain Charles Johnson some years after his execution, and is worthy of reproduction, as it gives undoubted proof of the alleged facts of his education, although it indicates a pusillanimity and cowardice on the part of the once dashing officer in the presence of death which should have inspired feelings of complete disgust in the public mind of Charles Town, instead of arousing its sympathies as it did.

<sup>1</sup> Howell, Vol. XV., p. 1291.

<sup>2</sup> Johnson, Vol. I., pp. 98, 99.

The following is a copy of this remarkable letter:

“Honoured Sir:

“I Have presumed on the Confidence of your eminent Goodness to throw my self after this manner at your Feet, to implore you’ll be graciously pleased to look upon me with tender Bowels of Pity and Compassion; and believe me to be the most miserable Man this Day breathing; That the Tears proceeding from my most sorrowful Soul may soften your Heart, and incline you to consider my dismal State, wholly, I must confess, unprepared to receive so soon the dreadful Execution you have been pleased to appoint me; and therefore beseech you to think me an Object of your Mercy.

“For God’s Sake, good Sir, let the Oaths of three Christian Men weigh something with you, who are ready to depose, when you please to allow them the Liberty, the Compulsion I lay under in committing those Acts for which I am doomed to die.<sup>1</sup>

“I intreat you not to let me fall a Sacrifice to the Envy and ungodly Rage of some few Men, who, not being yet satisfied with Blood, feign to believe that if I had the Happiness of a longer Life in this World, I should still employ it in a wicked Manner, which to remove that, and all other Doubts with your Honour, I heartily beseech you’ll permit me to live, and I’ll voluntarily put it ever out of my Power by separating all my Limbs from my Body, only reserving the use of my Tongue to call continually on, and pray to the Lord, my God, and mourn all my Days in Sackcloth and Ashes to work out confident Hopes of my Salvation, at that great and dreadful Day when all righteous Souls shall receive their just rewards: And to render your Honour a further Assurance of my being incapable to prejudice any of my Fellow-Christians, if I was so wickedly bent, I humbly beg you will, (as a Punishment of my Sins for my poor

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<sup>1</sup> There is no record to be found anywhere as to who these men were, or of why they did not appear on the trial.

Soul's Sake), indent me as a menial Servant to your Honour and this Government during my Life, and send me up to the farthest inland Garrison or Settlement in the Country, or in any other ways you'll be pleased to dispose of me; and likewise that you'll receive the Willingness of my Friends to be bound for my good Behaviour and constant Attendance to your Commands.

"I once more beg for the Lord's Sake, dear Sir, that as you are a Christian, you will be as charitable as to have Mercy and Compassion on my miserable Soul, but too newly awaked from an Habit of Sin to entertain so confident Hopes and Assurances of its being received into the Arms of my blessed Jesus, as is necessary to reconcile me to so speedy a Death; wherefore as my Life, Blood, Reputation of my Family, and future happy State lies entirely at your Disposal, I implore you to consider me with a Christian and charitable Heart, and determine mercifully of me that I may ever acknowledge and esteem you next to God, my Saviour; and oblige me ever to pray that our heavenly Father will also forgive your Trespases.

"Now the God of Peace, that brought again from the Dead our Lord Jesus, that great Shepherd of the Sheep, thro' the Blood of the everlasting Covenant, make you perfect in every good Work to do his Will, working in you that which is well pleasing in his Sight, through Jesus Christ, to whom be Glory forever and ever,<sup>1</sup> is the hearty Prayer of

"Your Honour's

"Most miserable, and

"Afflicted Servant,

"Stede Bonnet."

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<sup>1</sup> Hebrews xlii. 20-21.

## CHAPTER VII.

The month of October, 1718, was one of turmoil and excitement in Charles Town. There had been rioting by night, threats of burning the town, and intimidation of the officers of the law, and the government was almost powerless to preserve the safety of the citizens of the Province. The town-watch, which had been established but a few years, was still in an imperfect state of organization, and disorders were not easily quelled. The militia guard around the public watch-house proved sufficiently strong to prevent Bonnet's crew from being released, but, as has been seen, the guards at the house of Marshal Partridge, where the leader was held in custody, were not proof against bribery, and three days before the time set for the trial, the country had been thrown into a state of alarm by the intelligence of the escape of Bonnet and his chief officer. Rumors were abroad concerning the descent of combined pirate fleets upon the coast, and a sense of the most imminent danger was realized, not only by the government, but by every citizen of the Province. They felt that their homes and their families were not safe. The pirates in times past had not scrupled to put the unprotected cities of the Spanish dominions to the torch for purposes of revenge, and they were now exhibiting a spirit of audacity not equaled by their most daring leaders since the days of Morgan's rule in Jamaica. The Carolina coast was wholly unprotected, the recent Indian wars had exhausted the fighting strength of the military, and a pirate force could have sailed up the harbor, and landed in front of the custom-house before a single movement could have been made to oppose it.

Nor was this sense of danger on the part of the Carolinians a newly-awakened one. Numerous petitions had

been sent to England by the government, as well as by private citizens, praying for assistance and relief,<sup>1</sup> but the home government had its hands full of its own affairs and nothing was done to aid the colony. These conditions had now been existing for many months, and so serious had the situation become that long before the pirates had commenced their serious outrages, addresses from the Representatives and inhabitants had been presented to the authorities by Joseph Boone, the London agent of the colony, relating their miserable condition, arraigning the Lords Proprietors for neglecting their duty, and praying that "their once flourishing Province" might be added to those already under the jurisdiction of his Majesty.<sup>2</sup> But these applications, urgent as they were, received no attention, and matters grew worse and worse until now it seemed that the colony was to be destroyed by the hand of its lawless enemies.

On the capture of Bonnet, Governor Johnson addressed an appeal to the Lords of Trade, giving a faithful account of the recent happenings, and expressing the fear that the pirates infesting the coast would be so enraged at the capture, that the colony, as well as its trade, would be greatly endangered. He represented to the Board the necessity of immediate protection, and begged that a war-vessel be stationed at Charles Town without delay.<sup>3</sup>

This communication was dated from Charles Town, October 21st, 1718, and the ink was scarcely dry on its pages before the Governor's worst fears were realized. Bonnet was still languishing in prison awaiting trial when news was brought that one Moody, a notorious pirate, was off the bar with a vessel carrying 50 guns and 200 men, and that he had already taken two vessels bound from New England to

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 235.

<sup>2</sup> *Ibid.* Also Vol. I., p. 249.

<sup>3</sup> S. C. Hist. Soc. Coll., Vol. II., p. 237. This letter was delayed, not being received until the following May.

Charles Town.<sup>1</sup> Governor Johnson, immediately on the receipt of this intelligence, convened his Council and laid the situation before it. He represented to the members the danger of invasion, and the hopelessness of expecting aid from England. The colony, impoverished as it was, must strike a final blow in its own defense, and for it to be certain, the blow must be swift. His proposal was that an armed fleet be sent out against the invader without the loss of an hour's time. The Council, which was composed of the oldest and most experienced men in the Province, was well acquainted with the past history of the pirates on their coasts, and did not fail to appreciate the gravity of the situation, and the wisdom of the Governor's advice. After consultation, it was unanimously decided to adopt his suggestion, and preparations were immediately entered upon to equip an armament of sufficient weight of metal to cope with the 50 guns which Moody could at any moment bring to bear upon the illy-equipped forts around the city.

At this time there were nearly a score of trading vessels in the harbor, and to them the government turned for aid. But it was not to be expected that a sea-captain who had no personal interest in the port or its people would volunteer to run his vessel into so great danger where the hope of reward was so slight, and it was therefore found necessary to press the required ships into this extraordinary service. After making an examination into the condition of the available shipping, the Council selected the Mediterranean, Arthur Loan, master; the King William, John Watkinson, master;<sup>2</sup> and the Sea Nymph, Fayrer Hall, master, for the perilous expedition. To this fleet was added the Royal James, Bonnet's old vessel, which was being held in Charles

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<sup>1</sup> The account that follows here is taken partly from the S. C. Adm. Court Records (Book A and B), and partly from a letter written to Johnson by a person residing in Charles Town at the time. (*Hist. of Pyrates*, Vol. II., p. 324).

<sup>2</sup> Loan and Watkinson will be recognized as two of the assistant judges in the Bonnet trials which were being held at this time.



Town as a prize. She was placed in command of Captain John Masters, former master of the *Henry*, Rhett's flag-ship in the Cape Fear expedition. Eight guns were mounted between her decks, and the old pirate craft was, for once in her lifetime, fitted out for honest work. The *Mediterranean* was mounted with twenty-four guns, the *King William* with thirty, and the *Sea Nymph* with six. Having secured the necessary fleet, the Council apprehended some difficulty in finding a sufficient complement of men, and Governor Johnson issued a proclamation calling for volunteers, and promising them all the booty that might be taken.

On Rhett's return from Cape Fear, he had had a quarrel with Johnson in consequence of some action of his in connection with that expedition, and the Governor determined to take command of this enterprise and lead the fleet against the pirates in person at the earliest possible moment.<sup>1</sup> This action infused confidence into the people, and in a few days three hundred volunteers were on board the vessels awaiting orders to sail. But a serious delay was still to be met. The masters of the impressed vessels made no objection to giving their personal services to the colony, but their owners were to be considered, and they now entered a formal protest, strongly representing that some security should be given by the government to indemnify them for the possible injury or capture of their vessels by the pirates. Governor Johnson recognized the justice of their plea, and immediately convened an extra session of the Assembly and laid the case before it. Without delay the Assembly voted a bill to secure the ship-owners against all losses and expenses they might incur.

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<sup>1</sup> This reason for Rhett not joining the expedition is based on a letter of the Proprietors on the subject, which censured him for certain action connected with the Cape Fear expedition. This letter was never sent, however, and the Proprietors thanked him for the part he played. See Rivers, p. 285. At the same time, however, they held him highly culpable for not assisting Johnson in the present instance. See S. C. Hist. Soc. Coll., Vol. I., p. 168.

These proceedings delayed the expedition for about a week, but in the meantime scout-boats had been stationed along the shore of the islands at the harbor entrance, with orders to resist any attempt on the part of the enemy to land, and at the same time an embargo was laid on all shipping. Several days before the fleet was ready for sea, the boats off Sullivan's Island sighted a ship and a sloop, which, coming up to the bar, dropped anchor and attempted to land. They were prevented by the guards, however, who made a hostile demonstration on their approach, and for three days the two strange craft lay quietly at their moorings, making no movement calculated to arouse further suspicions.

Late on the evening of November 4th the fleet sailed down the harbor, and anchored several hundred yards below Fort Johnson, which commanded the main entrance to the port.<sup>1</sup> Orders had been issued for every movement to be made with the least demonstration possible, and the vessels reached their anchorage without being detected by the enemy. They lay quiet all night, and as the gray mist of early morning crept slowly over the ocean, Governor Johnson, from the deck of his flag-ship, the *Mediterranean*, signaled his consorts to weigh anchor and follow him. The commander of each vessel had been carefully instructed before the fleet had left Charles Town. No warlike display was to be made until the final moment, and the four vessels now steered in the direction of the pirate fleet with the guns all under cover, and the men below decks. By eight o'clock they were close to the enemy. The deception was complete. Mistaking them for merchantmen, the pirates promptly weighed anchor, and stood in toward the mouth of the harbor to intercept the retreat which they were certain would be attempted. Having placed themselves between the South Carolinians and the harbor, they now hoisted the black flag

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<sup>1</sup> See allegations of Loan *et al.*, in libel against N. Y. Revenge, S. C. Adm. Court Rec., Book A and B.

and called on the King William to surrender.<sup>1</sup> At this moment Johnson ran the king's colors to the masthead of the Mediterranean, threw open his ports and delivered a broadside which swept the decks of the nearest vessel with murderous effect. Before they had recovered from the consternation into which they were thrown by this sudden manœuvre, the South Carolinians bore down upon them, and began the battle in desperate earnest and at the closest possible quarters. The hatches were thrown open, the men poured from below the decks, heavily armed, while the 68 guns of the combined fleet poured broadside after broadside into the pirates, who were now hemmed in between the shore and the open sea. By skillful management, however, the ship escaped from this precarious position, and made all sail possible in order to elude the desperate chase of the South Carolinians. Johnson signaled the *Sea Nymph* and the *Royal James*, or the *Revenge*, as she was now called, to look to the sloop, while he, in company with the *King William*, made hot pursuit after the ship, which seemed to have every chance of escape.

The pirate sloop, which carried six guns and 40 men, unable to reach the open sea, was now vigorously attacked by Hall and Masters. The pirates defended themselves with a valor worthy of a better cause, and for four hours, with the vessels almost yard-arm to yard-arm, they maintained the fiercest struggle ever known in those waters. Finally they were forced to abandon their guns and seek shelter in the hold from the tremendous fire which was sweeping the vessel from stem to stern. A few moments later the South Carolinians came alongside and boarded, despite the desperate resistance made by the captain and the few men who had not fled below. Reaching the decks, the attacking party made quick work of the pirates, although the latter defended themselves with the desperation of men who real-

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<sup>1</sup> Arthur Loan *et al.* vs. the *Eagle*. S. C. Adm. Court Rec., Book A and B.

ized that they had but one chance left to them for life. In a short time every man above decks, including the chief, who fought to the death with the fury of a lion, was either killed or disabled, and the boarding party found itself in undisputed possession of the vessel. The men who had fled into the hold surrendered without another blow, and a few hours later the sloop, with her surviving crew fast in irons, was carried into Charles Town in triumph. The struggle, which took place almost within sight of the city, created the most tremendous excitement among the inhabitants, which rose to a pitch of almost indescribable exultation as the throng along the wharves saw the *Sea Nymph* and the *Revenge* rounding into the harbor, the royal ensign at the masthead signaling their victory.

Governor Johnson, while not forced to such desperate fighting as his subordinates of the *Revenge* and the *Sea Nymph*, had a long, hard chase after the fleeing ship, and did not come up with her until the middle of the afternoon. During the pursuit the pirate abandoned the defense and bent every energy to effect his escape. He lightened the ship in every possible way, and even threw over the guns and boats, but all to no avail. The South Carolinians had the fastest sailers, and as soon as they came within range, Governor Johnson ordered the *King William* to open fire. The first discharge raked the deck of the ship, killing two of the crew, "and having received a shot between wind and water," the pirates hauled down the black flag and made an unconditional surrender.<sup>1</sup>

When the hatches were opened, to the great surprise of the captors it was discovered that the hold of the ship was crowded with women, and, upon investigation, the vessel proved to be the *Eagle*, bound from London to Virginia and Maryland with one hundred and six convicts and "covenant servants," whom it was designed to settle in those colo-

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<sup>1</sup> Arthur Loan *et al. vs. the Eagle*. S. C. Adm. Court Rec., Book A and B.

nies, thirty-six of them being women.<sup>1</sup> The Eagle had been captured by the pirate sloop, which was known as the New York Revenge, near Cape Henry, and converted into a tender. Six guns had been placed in her, and her name was changed to the New York Revenge's Revenge, John Cole being given the command. A large number of the crew and of the convicts allied themselves to the pirates, while those who refused to join them were held as prisoners.

A still more serious surprise awaited the Governor, however, on his return to Charles Town to look after the issue of the conflict between the sloop and the rest of his fleet. It was ascertained that the captured vessels did not belong to Moody at all, nor did the captive crews have any connection whatever with him. The commander of the pirates, who had been killed on board the sloop, proved to be no less notorious a personage than Richard Worley, who had so terrorized the coasts in the vicinity of New York and Philadelphia but a few weeks previous. Naturally Johnson was much gratified at having exterminated so dangerous a company of outlaws, but the question as to the whereabouts of Moody was still one of vital interest to the colony. The statements of the prisoners were certainly not above suspicion, and no one could say positively that Worley's crew was not a part of Moody's company. It was altogether possible, if not probable, that Moody was hovering within the headlands of one of the neighboring harbors, and would, if in his power, wreak a cruel revenge on the colony for the capture and slaughter of his confrères.

To guard against the possibility of his making a sudden descent on the port, Johnson determined to maintain his fleet in a state of thorough organization until he was satisfied that all danger was past. A few days afterwards the public anxiety was relieved by the arrival of the Minerva, Captain Smyter, from the Madeira Isles. Smyter reported

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<sup>1</sup> S. C. Adm. Court Record, Book A and B, inventory of the Eagle's cargo.

that he had been taken off the bar by Moody, who about the same time received information of the preparations which were being made in Charles Town to capture him. He had accordingly taken the *Minerva* about a hundred leagues out to sea, where he had plundered her, after which he set sail for New Providence in order to avail himself of the king's proclamation of pardon, which had been brought out by Governor Woodes Rogers.<sup>1</sup>

Worley's career as a pirate was a brief, though remarkable, one, his exploits extending over a period of less than six weeks. He set out from New York during the latter part of September, 1718, in an open boat, with eight companions. They ran down to Delaware Bay, where they plundered a small vessel, which, upon being released, went to Philadelphia and reported the outrage. The news created much alarm, and advices were sent to New York warning that government of the danger. An expedition was fitted out against Worley,<sup>2</sup> but proved unsuccessful, and a few days later he captured a Philadelphia sloop, which he converted to his own use. His ravages were so continual during the next few weeks that the Governor of Pennsylvania ordered his Majesty's war-ship *Phoenix*, which lay at Sandy Hook, to go in quest of the desperadoes. The *Phoenix* scoured the coast, while Worley stood out to sea, and thus he escaped the second time. He then made his way south, and arrived off Charles Town just after Moody had taken flight, and, knowing nothing of the preparations in progress, he fell a victim to the fate that Governor Johnson had prepared for the other, but not less dangerous, enemy.<sup>3</sup>

The majority of the prisoners brought into Charles Town on this occasion had been dangerously wounded, and the authorities made all haste to have them condemned and

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<sup>1</sup> Johnson, Vol. II., p. 239.

<sup>2</sup> Minutes Provincial Council Pa., Vol. III., p. 49.

<sup>3</sup> Johnson, Vol. I., p. 342 *et seq.*

executed lest they should die of their injuries before the law could be vindicated. Accordingly, on November 19th, Judge Trott convened the Vice-Admiralty Court at the house of Garrett Vanvelsin, and twenty-four indictments were given out by the Attorney-General, fifteen being based on the circumstances of the taking of the *Eagle*, near Cape Henry, and nine on those of the capture of the *Expedition* on October 29th, near Hatteras. The trials lasted for five days, and a verdict of guilty having been returned in every case, Judge Trott, on November 24th, passed sentence of death upon the entire company. Pursuant to this sentence the following men were executed a few days later: John Cole, commander of the *Eagle*, "alias the New York Revenge's Revenge"; Thomas Prizgar, John James, Abraham Henderson, Ralph Mudge, John Swinnock, William Queen, William Ford, Nicholas Whealan, Sabastien Taunten, Daniel Stannel, John Clarke, Thomas Shaddock, and Francis Frisher, John Borfield, John White, Nathaniel Cade, William Vaughn, John Mason, John Ryley, George Pocock, John Acon, Richard Jackett, and James Lincolne. The last nine, together with Cole, belonged to the New York Revenge's Revenge, or the *Eagle*, and were convicted on evidence implicating them in the capture of the *Expedition*. During these trials, Andrew Allen, a prominent merchant and shipowner of Charles Town, whose vessel, the *Providence*, had been captured by pirates two years before, sat on the grand jury.

Dr. Alexander Hewat, the old colonial historian of South Carolina, is guilty of a serious error in regard to the Worley expedition and trials which has caused every subsequent writer to go astray. He states that the pirate crew "fought like furies until they were all killed or wounded except Worley and another man, who even then refused to surrender until they were likewise dangerously wounded. These two men, together with their sloop, the Governor brought into Charles Town, where they were instantly tried, condemned and executed to prevent their dying of their

wounds."<sup>1</sup> Dr. David Ramsey, who in a large part of his history follows Hewat blindly, often using him *verbatim et literatim* without according him the slightest credit, repeats the error,<sup>2</sup> and Professor Rivers, who is usually very painstaking and accurate, has permitted himself to be led off into the same misstatement.<sup>3</sup> These writers could easily have found the correct account of the conflict and the subsequent proceedings by referring to the Vice-Admiralty Court records, which are contemporaneous, and are as full on many of the points as any historian could wish. Johnson, in his "History of the Pyrates," committed the same error, although he corrected it in a later edition. It is not improbable that it was on Johnson's earlier edition that Hewat based his account. It is rather a remarkable circumstance that although the Admiralty Court journals have been freely accessible for a hundred years or more, and contain much material of the greatest value, they have been wholly neglected, and have been used in no single case that can be found. It is hardly probable that their existence has all the time been unknown.

While much has been preserved regarding the exploits of Worley and his capture by Johnson, unfortunately the records of the trials of the pirates who survived, are very meager, and but little testimony can be gathered from them. In the subsequent proceedings looking to the condemnation of the prizes, the claim of Edmond Robinson, chief mate of the *Eagle*, gives in an interesting and unique manner the details of the capture of that vessel by the pirates.<sup>4</sup> He says:

"On the 24th Day of October last past being in about the Latitude of Thirty Seven Degrees North, and Thirty Five Leagues distant from Cape Henry, met with a certain Pyrate

<sup>1</sup> See Carroll, Vol. I., p. 210.

<sup>2</sup> Hist. of S. C., Vol. I., p. 203.

<sup>3</sup> Early History, p. 285. The error is also repeated in Winsor, Vol. V., p. 324.

<sup>4</sup> S. C. Adm. Ct. Rec., Book A and B.



Sloop, named the New York's Revenge, Commanded by one Richard Worley, a Pyrate since Dec'd who Chased the said Ship Eagle Galley all that Day, and fired a volley of small arms at them, and kept them Company all that night, and the next Day being the Twenty fifth of the said October, the said Pyrates hoisted a black Flagg with a humane Skelleton on it which so much terrified the Said Ship Eagle's Company, that the men not only refused to fight, but also hindered the Officers themselves in their Duty of Defending the said Ship Eagle Galley, and many of them ran into the hold whereupon the Said Pyrate Crew came up along side the Said Eagle Galley, and swore that if the Eagle's Company would not strike their pennant, they would kill every soul of them, which was done. . . That the said Pyrates having as aforesaid gotten possession of the Said Ship Eagle Galley barbourisly beat the Said Staples and Severall of his men for being so bold as to fire at them, and then forced the Said Staples and all the others into the Said Pyrate Sloop. . . And the Said Pyrate afterwards called the Said Ship Eagle Galley by the Name of the New York Revenge's Revenge, and put one James Cole, a Pyrate, to Command her as Captain thereof, together with other Pyrates. That the Said Pyrates having New named the said Ship Eagle Galley, and named her as aforesaid, came and lay off the Barr of Charles-town."

In the operations against the pirates the colony had so far been victorious. Two of the most dangerous freebooters on the coast had been taken and hanged, together with their crews, but the danger was by no means past. The sea was yet covered with pirate craft, manned by as desperate outlaws as any of those who had paid the penalty of their crimes at White Point. Every month brought intelligence of renewed outrages, of vessels sacked on the high seas, burned with their cargo, or seized and converted to the nefarious uses of the outlaws.

Governor Johnson was no dreaumer, and he did not lull himself into a fancied security because of the success of the

exploits of the daring Rhett and himself. South Carolina had on more than one occasion before felt the vengeance of the pirate hordes, and he knew that every effort would be made to visit it on the impoverished colony again; and should the blow fall, his judgment told him that it would come with a more crushing force than ever before. The Province itself was unable to do anything more. The cost of the two naval expeditions had wrecked the already depleted treasury, and as yet the English authorities had given no indication of their intention to do anything to assist their hard-pressed fellow-countrymen in the distant colony.

But Johnson did not despair, although he did not encourage the thought of expecting any assistance from abroad. On the contrary, he insisted that the people should help themselves, and in February, 1719, the Assembly passed an act appropriating sufficient funds to pay the debts incurred by the equipment of the two expeditions.<sup>1</sup> In the meantime the Governor had forwarded another letter to the Lords of Trade, in which he gave a full account of the recent occurrences, narrating how his fears had been realized, and insisting that a ship-of-war should be sent to South Carolina immediately unless their Lordships were willing to see the trade completely ruined. In this communication the Governor expressed himself with great earnestness, claiming for the colony some consideration at the hands of the Board, and reminding it that during the previous year the Province had supplied for the use of his Majesty's navy 32,000 barrels of tar, 20,643 barrels of pitch, and 473 barrels of turpentine.<sup>2</sup>

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<sup>1</sup> S. C. Statutes, p. 69. Gov. Johnson in a letter to the Board of Trade claimed to have expended £1000 from his private purse in forwarding these expeditions and otherwise assisting the Province during these troublous times. See S. C. Hist. Soc. Coll., Vol. II., p. 239.

<sup>2</sup> S. C. Hist. Soc. Coll., Vol. II., p. 236. In hopes of destroying the Swedish monopoly, the government was at this time offering a bounty on naval stores sent from the colonies. See Cunningham's *Growth of Eng. Industry and Commerce in Modern Times*, p. 285.

If the principle that great bodies move slowly were applied in the present case, it would prove the British Board of Trade to have been the most ponderous body in all the complex organism of the English government. The last-mentioned communication, which was written on December 12th, 1718, was received on February 24th, 1719, and the urgency of the case must certainly have been appreciated at a glance. But the imminent danger which was threatening one of the finest Proprietaries of the Crown, situated in a remote and unknown region a thousand leagues beyond the sea, was not a matter of sufficient import to disturb the distinguished repose of these noble Lords, and two months passed before they would even so much as deign to have the communication read in their counsels. Having finally received a formal reading, Mr. Secretary Craggs, to whom it was referred, considered it, and consented to recommend to the Lords of the Admiralty that the request for a ship-of-war be granted. This recommendation was adopted with a qualification, and the whole matter was referred back to the Board of Trade, and at last, on April 29th, a letter was forwarded to Governor Johnson, acknowledging the receipt of his last communication, stating through what circuitous channels his application had passed, and informing him that the Lords of the Admiralty had consented to send a frigate "as soon as possible."

While Governor Johnson was busying himself seeking relief from England, the courts of the Province found themselves engaged with an immense amount of litigation growing out of the pirate captures, which sunk the government still deeper in debt. While the men who went out with Rhett and Johnson to do battle with the public enemy were, in many cases, actuated by the highest motives of patriotism, they were not wholly uninfluenced by the hope of substantial reward.<sup>2</sup> It is not surprising, then, that the courts were

<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 258.

<sup>2</sup> See S. C. Hist. Soc. Coll., Vol. I., p. 195, for notice of payment of bounty from the Crown to the captors of the *Royal James*, etc.

overwhelmed with condemnation proceedings instituted by the men who had undertaken the enterprises. There were claims and counter-claims, and the court records of the time are filled with depositions and decrees in cases, the costs of which must have amounted to a greater sum than the value of all the property involved in the voluminous litigation.

Bonnet was yet languishing in prison awaiting execution when John Masters and Fayrer Hall, commanders of the sloops *Henry* and *Sea Nymph* respectively, entered a libel suit in the court of Vice-Admiralty against the *Royal James*, alleging the manner of her capture, and praying the court to order "all and singular the Negroes, Goods and Merchandise aboard the same" to be condemned and sold and the proceeds turned over to the captors. Colonel Rhett, who seemed to be the only one on the Cape Fear expedition who did not demand a reward for his services, waived all claim to any part of the *Royal James* as a prize. Attorney-General Allein, acting in the capacity of a private attorney, appeared for the libellants, and, after a lengthy trial, Judge Trott appointed Rhett agent for the court, and decreed that the prizes should be sold and the proceeds given to the captors. Several parties had entered claims to portions of the cargo, alleging that they had been dispossessed of it in an unlawful and piratical manner by Bonnet. These claimants were allowed one-half the value of their property.

The result of Master's connection with Governor Johnson's expedition was another suit in Admiralty, in which he was joined by Captains Loan, Watkinson, and Hall, all of whom were anxious to be paid in full for the services they had rendered the Province. Of all this group of cases, the one which attracted the most interest was that against the *Eagle*, which, as we have seen, was rechristened the *New York Revenge's Revenge* when taken by the pirates. All the officers, and that portion of the crew which had refused to join the pirates, were in Charles Town, although the commander, Robert Staples, who had been so "barbourisly

beated" by Worley's men, had died before the trials were begun. Edmond Robinson, the chief mate, had assumed command of the crew, however, and engaging legal counsel, he made a hard fight in behalf of his owners for the vessel and her cargo. The fact that Governor Johnson had promised all prizes to the volunteers was a point on which the libellants fought with much determination. But what gave the case its great interest was the peculiar nature of the cargo. It was a unique sight, even in that day, to see litigants wrangling over the actual possession of something more than a hundred white slaves,—for such they were to all intents and purposes. Judge Trott, after hearing a voluminous mass of testimony and argument, decreed that the "convicts and covenant servants" should be "publicly sold, or assigned over to such persons as shall be minded to purchase them for the several terms" for which they were bound or sentenced, the proceeds, less the expenses of sale, to be delivered to Robinson as agent for his owners. History relates nothing concerning the sale of these human chattels, which was certainly one of the most remarkable ever known in the annals of slavery in America.<sup>1</sup>

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<sup>1</sup>The foregoing is all based on the MS. Vice-Admiralty Court Records, Book A and B.

## CHAPTER VIII.

The events of the autumn of the year 1718 can be said to have forever ended the exploits of the pirates on the Carolina coasts. Not that they were entirely exterminated, but seeing the desperation of the South Carolinians, they concluded that it was wiser to be discreet than valorous, and shifted the scene of their operations. Here and there we find accounts of further outrages, but these were only isolated cases, and had no effect on the commercial life of the Province. Occasionally a pirate would be captured and brought into Charles Town, and while no records of any further trials are extant, there is reason to believe that executions took place later than 1718.

The colonists had the pirates on the run, and whenever they appeared on the coast it was only to remain for a short period, secure what booty they could, and make off in hot haste before the authorities could learn of their presence. In the summer or early autumn of 1719 the inhabitants were still further relieved by the arrival of the man-of-war *Flamborough*, Captain Hildesley, which was placed on duty at Charles Town, while the *Phoenix*, Captain Pierce, which had made an unsuccessful attempt to capture Worley, cruised along the coast, keeping a sharp eye out for any of the freebooters who might venture to depredate on the commerce of any of the colonies.<sup>1</sup>

In December, 1719, the South Carolinians, despairing of prosperity under the Proprietary government, broke out in

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<sup>1</sup> Hewat, in Carroll, Vol. I., p. 249. The Boston News Letter of July 16th, 1724, says that 130 pirates were captured off Charles Town, and that each of the captors received £5000 as his share of prize money. This is an absurd exaggeration.

open revolt, and declared James Moore Governor in the name of the King. Johnson, who was very popular, was offered the government on the condition that he would renounce the authority of the Proprietors. This he declined to do, and was driven from power. A few months later, Moore was superseded by Governor Francis Nicholson, late of the Province of New York, who, upon his accession, found the Province entirely freed of the fear of the pirates. Shortly before the late revolution, news was received at Charles Town of an intended attack by the Spaniards of Havanna, and the Province was thrown into a state of agitation lest the pirates should ally themselves with the enemy, and seize the opportunity to wreak their vengeance on the colony. So startling was this intelligence that the *Flam-borough* was immediately dispatched to New Providence to intercept the invaders from that point, but a storm scattered the Spanish fleet, and the vessel returned to Charles Town with the pleasing information that danger was past.

When Governor Nicholson arrived, the colonists had so far recouped themselves that they could with ease have beaten off the pirates had they made their appearance. They were still considered such a dangerous menace, however, that Nicholson received special instructions regarding them. He was told what was to be done with them and their effects in the event of their capture, and his attention was particularly directed to the English statutes on the subject.<sup>1</sup> Having assumed the reins of government, he immediately communicated with the home authorities regarding the appointment of a commission to hear all cases of piracy, and an order of Council was issued creating such a body.<sup>2</sup>

There seems to have been some controversy as to who should constitute the commission. Governor Nicholson submitted his nominees, and Colonel John Barnwell and

<sup>1</sup> See instructions to Nicholson, S. C. Hist. Soc. Coll., Vol. II., p. 145.

<sup>2</sup> Sept. 20th, 1720. S. C. Hist. Soc. Coll., Vol. II., p. 149.

Mr. Joseph Boone, the London Carolina agent, also suggested a number of persons for the positions.<sup>1</sup> The final nominations were made by the Council to the Board of Trade, and before the end of the year the new regime was ready to proceed with all cases in proper legal form.

Nicholson occupied the governorship until 1725. During his administration no trials were held, although had the war-vessel stationed at Charles Town kept proper watch the good people of the Province might have feasted their eyes on more than one more tragic scene at White Point. On numerous occasions the Charles Town merchants were given great unrest by rumors of pirates in the vicinity of the port, and a number of outrages went unavenged. The first was in the summer of 1722, when George Lowther, the famous English freebooter, appeared off the coast. He had been off the bar several days when the ship *Amy*, commanded by Captain Gwatkins, came out of Charles Town, bound for England. Lowther attacked him immediately, running up the usual "bloody" ensign and ordering a surrender. Gwatkins, so far from being terrified, returned the pirate's fire, and attempted to close in for a fight at close quarters. Lowther had not calculated upon such a movement and sought to escape, but the *Amy* crowded him so close in to the shore that his vessel went aground, and the crew was forced to save itself by swimming ashore. Gwatkins, unwilling to leave the pirate to right his vessel and continue his cruise, tried to set fire to the stranded bark, and while engaged in the attempt was fired upon from the beach and killed. The *Amy*'s men retreated to their vessel and continued their voyage, while Lowther got his sloop afloat and put into an inlet on the North Carolina coast for repairs. He spent the winter in North Carolina, and continued his cruise again in the spring of 1723.<sup>2</sup>

The next outrages during Nicholson's administration

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 149.

<sup>2</sup> Johnson, Vol. I., pp. 361, 362.



were perpetrated by the New England freebooter, Edward Low, whose desperate exploits were the wonder of his time. In company with Harris, a desperado whose career was scarcely less infamous, Low came to the South Carolina coast in May, 1723, and in the course of a very short time captured the Crown, Captain Loveverigne, the King William, Captain Carteret, and a brigantine, all of which had just come out of the harbor of Charles Town. Having plundered these vessels, he shortly afterwards took the Amsterdam Merchant, Captain Williard, in the same vicinity. This vessel was from Jamaica and was owned in New England, and as a special mark of his regard for his old home he cut off Williard's ears and slit his nose before dismissing him. No record of the exact number of vessels taken by Low on this cruise has been preserved, but it is known that a few weeks later he seized two brigantines bound from Carolina to London, and a schooner bound from New York to Carolina.

These captures do not seem to have caused any great agitation in Charles Town, and it is probable that no news of them was received until some time after Low had left the coast. About a month later Low and Harris were attacked by the war-ship Greyhound, and the latter captured with all his crew. They were carried into Rhode Island and condemned for piracy, and hanged near Newport.

Despite these interruptions, the commerce of Carolina prospered during this period as it had never done before since the founding of the colony. The people made great strides along all lines of development, and when Nicholson returned to England in 1725, leaving Arthur Middleton in control of affairs, the colony was one of the most valuable attached to the Crown. Francis Yonge, the London agent, had little to do save to submit gratifying reports of the state of trade, and if there were any piratical incursions during the latter years of his term, they produced so slight an effect on the great current of business that they were not considered worthy of any official notice.

There are few notices of the pirates from 1723 to 1730. William Fly, who was executed in Boston shortly afterwards, took the sloop John and Hannah on the North Carolina coast in 1726,<sup>1</sup> and one Lewis, during this period, spent several months in North Carolina trading with the people, during which residence he managed to evade the vigilance of the officers of the law.<sup>2</sup>

In 1730 Robert Johnson, who had been deposed from the governorship in the revolution of 1719, was again raised to that dignity. Some idea can be gained of how the pirates of his former administration had been forgotten when we learn that in his commission he was given no authority to proceed against criminals of this class, and his instructions contained only a more or less perfunctory clause in regard to them.<sup>3</sup>

For more than four years after Johnson's resumption of office, the Province was undisturbed by even so much as a rumor of pirates, but in August, 1734, there was evidently some apprehension on the part of the government that the properly constituted commission might be needed. Shortly before this time a Spanish schooner, the crew of which had mutinied and killed the master, was brought into Charles Town, and the circumstances were such that Johnson had one of the sailors arrested for piracy. The commission for the trial of pirates in Carolina had expired on the death of George I. in 1727, and there was so little use for it that the new sovereign had never renewed it. He had issued a proclamation, however, that all officers be continued at their posts until further advice. On the strength of this the Governor ordered the case heard before the old commission, and forwarded a record of the trials to the High Court of Admiralty in England for approval.<sup>4</sup>

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<sup>1</sup> Johnson, Vol. II., p. 232 *et seq.*

<sup>2</sup> *Ibid.*, p. 254.

<sup>3</sup> S. C. Hist. Soc. Coll., Vol. II., p. 179.

<sup>4</sup> S. C. Hist. Soc. Coll., Vol. II., p. 263. On Nov. 6th, 1728, judges were commissioned in all the colonies to try pirates. See N. J. Archives, 1st Series, Vol. V., p. 196. It seems that the commissions for Carolina, though regularly issued, were never sent to the Province.

Just what the other cases of this period were is not known, but it is certain that they were several in number.<sup>1</sup> In communicating an account of his course to the Duke of Newcastle, Johnson asked for the issuance of a new commission, and it not being granted, he did not deem it of enough importance to warrant his pressing the application.

By this time the pirates on the coasts had been completely exterminated, and vessels came and went, unarmed and unguarded, without fear of interruption. Eight years afterwards, in 1742, Lieutenant-Governor Bull, in announcing the death of Vice-Admiralty Judge William Trewin, incidentally called the attention of the Duke of Newcastle to the fact that no other commission for the trial of pirates existed than the one authorized by his late Majesty, and prayed that a new one be issued.<sup>2</sup> The request was the second time ignored, and was never renewed. The reason for the existence of the commission no longer held good; the pirates who had once terrorized the country and paralyzed the chief branches of trade were no more, and the commission, lately so important a part of the governmental economy, was now only a useless appendage which could well be permitted to expire.

Although the pirates themselves were seen no more along the coast, they had made too deep an impress on the history of the Carolinas to be forgotten, and for many years, here and there in the statutes, an obsolete clause regarding the method of trial and punishment stands out like an ominous warning from the past. As late as 1736 an act "For ascertaining public officers' fees" includes two heads, providing for the fees of the Register and Marshal of the Admiralty Court "for the tryal of pyrates." For drawing the death warrant of the condemned the Register was to receive two shillings sixpence, and for executing the extreme penalty of the law the Marshal was paid one pound.<sup>3</sup> In the days of

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<sup>1</sup> S. C. Hist. Soc. Coll., Vol. II., p. 263.

<sup>2</sup> *Ibid.*, pp. 275-6.

<sup>3</sup> S. C. Stats., pp. 420-421.

Bonnet and Thatch, when the rabble of Charles Town was regaled with the ghastly sight of scores of dead men hanging from as many gibbets, the stout-hearted marshals drove a thriving trade, but times had now changed. Better days had come, and the grave colonial statesmen who still formulated laws against the ancient enemy with all the solemn usage of the English Parliament, did so knowing that they were but perpetuating a memory of the dark past,—of a period when the colony was driven through a fiery ordeal, which was survived only by the exercise of an indomitable courage, prompted by an abiding faith in the destiny which was to be realized in the future.

White Point, the "Execution Dock" of old Charles Town, still remains. Its desolate mud-flats have been converted into smiling gardens, surrounding stately old mansions, whose broad, colonnaded verandas and antique architecture carry one back to another century. Its extreme point, reaching out into the bay, is no longer a spot of superstitious dread, but, with its shady walks, offers a delightful retreat from the heat of the burning southern sun. Fort Johnson, whose guns were mounted nearly two hundred years ago to repel the invading enemy, is still seen across the harbor, and Shute's Folly, with its dismantled fortress of more modern times, stretches its low, marshy shore in front of the city, but little changed since the days of West and Morton, when its only ornament was a lofty gallows, from which pirates were hanged in chains until their blackened corpses fell to pieces beneath the action of wind and sun.

VIII-IX

REPRESENTATION AND SUFFRAGE  
IN MASSACHUSETTS, 1620-1691



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

VIII-IX

REPRESENTATION AND SUFFRAGE  
IN MASSACHUSETTS, 1620-1691

BY GEORGE H. HAYNES, Ph. D. (J. H. U.)

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# CONTENTS.

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## CHAPTER I.

INTRODUCTION :	PAGE.
The Patent from the Council for New England . . . . .	7
The Royal Charter . . . . .	7
Organization : Endicott at Salem . . . . .	9
Transfer of the Charter . . . . .	10

## CHAPTER II.

BEGINNINGS OF REPRESENTATION IN MASSACHUSETTS :	
Growth of the Assistants' Oligarchy . . . . .	12
Religious Oligarchy : Church Membership a Condition of Citizenship . . . . .	14
Reaction : The Watertown Protest . . . . .	17
Representative Tax Commission . . . . .	18
Preliminary Meeting of Deputies . . . . .	19
General Court of 1634: A Representative Body . . . . .	20
Reforms . . . . .	21
Representation made Permanent . . . . .	22
Origin of Representation in Massachusetts and in other Colonies, compared . . . . .	22

## CHAPTER III.

THE FIRST DECADE OF REPRESENTATIVE GOVERNMENT—1634-1644 :	
Conditions of Freedom made more strict . . . . .	25
Admission and Powers of "Inhabitants" . . . . .	26
Election Methods . . . . .	29
The General Court . . . . .	35
Apportionment of Deputies . . . . .	35
Assertion of Privileges . . . . .	38
Controversies between Deputies and Assistants . . . . .	39
The Cambridge Congregation . . . . .	39
"The Sow Business" . . . . .	41
The General Court becomes bi-cameral . . . . .	43

## CHAPTER IV.

REPRESENTATION AND SUFFRAGE—1644-1688 :	PAGE.
Powers of the General Court . . . . .	46
Deputies must be orthodox. Lawyers excluded . . . . .	46
Assistants, Aristocratic and Conservative . . . . .	47
The Religious Qualification . . . . .	48
Petition of Dissenters . . . . .	49
Admission of New Hampshire and Maine Settlements, . . . . .	52
Liberalizing Tendency in the Church . . . . .	54
Non-Freemen gain Local Franchise . . . . .	55
The Restoration, and the Royal Commission . . . . .	56
Nominal Abolition of the Religious Test—1664 . . . . .	57
Modifications of the Suffrage Qualifications . . . . .	59
The Charter Cancelled . . . . .	59
Dudley and the Council : Suppression of the Representative Assembly . . . . .	61
Tyranny of Andros . . . . .	61
Ipswich resists Arbitrary Taxation . . . . .	62
Restriction of Town-Meetings . . . . .	63
The Revolution of 1639 . . . . .	64

## CHAPTER V.

REPRESENTATION AND SUFFRAGE IN PLYMOUTH—1620-1691 :	
Constitutional Basis of the Plymouth Government . . . . .	66
Government by Primary Assembly . . . . .	67
Representation : A Representative Code Commission . . . . .	68
Proxy Voting in the Court of Election . . . . .	69
Representative General Court, 1638 . . . . .	70
Law of 1658 . . . . .	71
Admission and Powers of "Inhabitants" . . . . .	71
"Freemen" vs. "Inhabitants" . . . . .	74
Qualifications of a Freeman . . . . .	76
No Formal Religious Test . . . . .	77
Ratio of Freemen to Non-Freemen . . . . .	79
Plymouth Elections . . . . .	79
Massachusetts and Plymouth Representation, compared . . . . .	80
Plymouth joined to Massachusetts . . . . .	81

## CHAPTER VI.

CHANGES INTRODUCED BY THE CHARTER OF 1691 . . . . .	82
Appendix A. Disfranchisement in Massachusetts . . . . .	85
Appendix B. The Confederation of 1643 . . . . .	87

# REPRESENTATION AND SUFFRAGE IN MASSACHUSETTS, 1620-1691.

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## CHAPTER I.

### INTRODUCTION.

Toleration was not a seventeenth century virtue. Least of all could it find place in the Stuart system, based upon the divine right of kings. Dissenters soon learned that they were to look for as little favor from Charles I. as they had received from his father.

It was the conviction that there was now in England no hope for their cherished reforms that moved certain Puritan leaders to attempt in America the "raising of a bulwark against the kingdom of Antichrist." The first step toward that goal was the obtaining of a land-grant from the Council for New England. But this patent conveyed simply a full title to the land, together with undisputed privileges of trade. The patentees now stood on the same footing with a number of other private commercial companies. If to trade they wished to add schemes of colonization, they must secure a grant of governing power from the Crown.

As compared with the Separatists who founded Plymouth, the Puritans who were about to plant the colony of Massachusetts Bay enjoyed great advantages. They had not definitively broken from the established order; it was as Episcopalians that they came to America. Moreover, they were men of larger means and higher social standing than the Pilgrims, and throughout England they had friends of such influence that the King could not afford to be deaf to their petitions. In March, 1629, Charles I. signed the charter under which, through many vicissitudes, the new colony was

to be governed for more than half a century. By this instrument the six patentees, with the twenty new members whom they had associated with themselves, and "such others as should thereafter be admitted and made free of the Company," were constituted a body corporate and politic, by the name of the "Governor and Company of the Massachusetts Bay in New England." The management of this corporation was to be forever in the hands of a Governor, a Deputy Governor, and eighteen assistants, all of whom were to be chosen annually by and out of the freemen of the Company. Four General Courts, or assemblies of all the freemen, were to be held each year, while monthly, or oftener, the Governor and assistants might hold a court; at any of these, when the Governor and six assistants were present, they might admit freemen, administering to them, if they thought fit, the oaths of supremacy and allegiance. Subject only to the limitation that their enactments should not be repugnant to the laws of England, the freemen were empowered to pass all laws necessary for the government of the people living within their jurisdiction. The government which should be established by the Company was given "full and absolute power and authority to correct, punish, pardon, govern and rule," in accordance with its laws, all such subjects of England as should ever "inhabite" within the parts of New England granted to the Puritans.<sup>1</sup>

Such was the liberal charter which Puritan influence was still able to secure from Charles. "Omit the word 'Company,' and we have the constitution of an independent state, with very ill-defined powers."<sup>2</sup> But this charter was modeled very closely after those of other great companies incorporated for trade with America and India. Its language was conventional. According to all precedent, the body of the new corporation, remaining resident in England, would govern its plantations in the New World.

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<sup>1</sup> For the charter, see Records, Vol. I., p. 10.

<sup>2</sup> Lodge, *English Colonies in America*, p. 343.

The twenty-six men to whom the royal charter was granted were the original "freemen"; in the "freedom" of a trading company the germ of Massachusetts citizenship is to be found. Growth was provided for by the charter's giving the Governor, acting with at least six assistants, "full power and authority to choose, nominate and appoint such and so many others as they shall be willing to accept the same to be free of the said Company and Body, and them into the same to admit." Accordingly at the frequent courts new freemen were admitted. Nor was membership in the Company restricted to those who might enter it as a business venture; the two ministers who were called in to open the sessions with prayer were made "free of the Company."

Organization under the new charter was speedily effected. At a General Court held in London, April 30, 1629, there was instituted what was to be called the "Governor and Council of London's Plantation in the Massachusetts Bay."<sup>1</sup> By erection of hands, John Endicott was elected Governor. He was already on the ground. Hardly had the original land-grant been obtained when this rigid Puritan was dispatched with some fifty colonists to secure by occupation the Company's foothold upon its newly acquired territory. He succeeded in establishing friendly relations with the stragglers from previous settlements still clinging to Naumkeag (Salem), and made that little village the center of the new plantation. In the choice of Endicott's Council the general body of the freemen at Salem were given no voice. Seven members, three of them being ministers, were appointed by the Company. The Governor, together with these, was to select three more members from among the emigrants, while, as a mark of special conciliation, the "old planters" who had been settled at Salem before Endicott's arrival were to be allowed to select the two remaining councillors.<sup>2</sup> Thus far, it is to be noted, the steps taken were in

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<sup>1</sup> Records, Vol. I., p. 361.

<sup>2</sup> Not *three*, as stated by Doyle, *English Colonies in America*, Vol. II., p. 118.

perfect accord with the charter. "The sole managing and ordering of the government and of the affairs of the plantation" was, it is true, placed in the hands of a Governor and Council of twelve, resident in the colony, but in strict subordination to the Company in London.

Yet though the appointing power was so largely exercised by the Company, the Governor and Council, placed in power in the colony, were expressly "settled and established as an absolute government," and no prohibition was placed upon the colonists' electing their own officers and making their own laws in the future. Whether intentionally or not, the omission of such a prohibition left free scope for the important change which was soon to follow. During the summer, certain persons "of figure and estate" in England proposed to settle in the new colony, provided they might be allowed to take the charter with them and exercise its corporate powers in Massachusetts. This proposal was debated at the General Court held July 28, 1629.<sup>1</sup> After private consideration, and debate in the court held the next month, "by erection of hands it appeared by the general consent of the Company, that the government and patent should be settled in New England."<sup>2</sup> In accordance with this vote an arrangement was made by which the members of the Company who remained in England were to share for a certain number of years in the trading profits of the Company; but all powers of government were handed over to those who should become residents of the colony.<sup>3</sup> Under the new conditions it became necessary to have officers who would become leaders of the emigrants. Accordingly Cradock, the Governor elected on the nomination of the King in the charter, resigned and in his place was chosen John Winthrop. From this time few traces of the original trading company are to

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<sup>1</sup> Records, Vol. I., p. 49.

<sup>2</sup> *Ibid.*, p. 51.

<sup>3</sup> The legality of this transfer is discussed at length in Barry, Vol. I., pp. 175-6, and Washburn's *Judicial History of Mass.*, pp. 13-14.

be found. The obtaining of a charter under that form was merely a step toward a definite goal. The Puritans came not as trading adventurers. Comparing themselves with most other colonists of that period it was with simple truth that they declared: "Those planters go and come chiefly for matter of profit; but we came to abide here, and to plant the gospel, and people the country, and herein God hath marvellously blessed us."<sup>1</sup>

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<sup>1</sup> 1646, Winthrop, Vol. II., p. 367.

## CHAPTER II.

### THE BEGINNINGS OF REPRESENTATION IN MASSACHUSETTS.

The history of the colony of Massachusetts Bay during the first five years of its existence presents a record of phenomenal constitutional development—of development, however, by sharp action and reaction, rather than by steady progress toward a fixed goal. In 1629 the status of the colony was that of the weak trading post of a commercial company resident in London. Until the transfer of the charter the colony was ruled by a Governor and Council in whose election the resident freemen had had practically no voice. In 1634 the colony, embracing sixteen scattered plantations, was well advanced in an organization very like that of an independent State. Its connection with London partners was practically obsolete. Its charter was carefully preserved, but it was regarded as little else than a weapon of defense, to be produced in time of emergency; in the ordinary conduct of government its existence was ignored. The colony had its own Governor, its magistrates, and its representative legislature, all chosen by the body of the freemen.

On the nineteenth of October, 1630, there assembled in Boston the first General Court in the new colony. It was in no sense a representative body, but a gathering at which all those, and only those, who were "free of the corporation" were expected to be present; and as yet no freemen had been admitted since the transfer of the charter.<sup>1</sup> As established by the charter, the government of the Company was purely democratic. The election of officers and the making of laws were to be "by the freemen." But at this very first

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<sup>1</sup> Hutchinson, Vol. I., p. 25.



General Court, steps were taken which tended strongly toward an oligarchic government. The Assembly was much under the influence of the recently arrived Governor and his assistants, and Winthrop, as is repeatedly evident, profoundly distrusted democracy. The amount of power which the freemen here put out of their own hands is astonishing. They retained the power of choosing assistants, "when there are to be chosen," but "by the general vote of the people and erection of hands," assent was given to the proposition that the assistants should choose from their own number the Governor, and Deputy Governor, who with the assistants should have the power of making laws and choosing officers to execute the same."<sup>1</sup> Six months later a step was taken the natural effect of which must have been to still further narrow the oligarchy to which the conduct of the government was committed.<sup>2</sup> According to the charter, it was necessary in order that a court might be legal, that at least seven assistants should be present. In view of the fact that the number of assistants was small and that some of them were about to leave the colony, it was now voted that "whenever the number of assistants resident within the limits of the jurisdiction should be fewer than nine, it should be lawful for the major part of them to keep a Court, and whatsoever orders or act they made should be as legal and authentic as if there were the full number of

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<sup>1</sup> Records, Vol. I., p. 79. Hutchinson notes this as a departure from their charter. Vol. I., p. 25. The extreme conservatism of this law is only apparent upon noticing how the assistants were elected. The colonial officers, from Governor down, were chosen by show of hands upon oral nomination. Rotation in office was not then a ruling principle in politics, and in the case of the assistants a binding custom, soon embodied in law, required that the name of each assistant of the preceding year should in turn be put in nomination and either accepted or rejected by the majority vote of all the freemen present, before any new candidate could be voted upon. The inevitable result was practical life-tenure for the assistants.

<sup>2</sup> Mar., 1631. Records, Vol. I., p. 84.

seven or more."<sup>1</sup> In other words, it was made possible for five men, or even less, not only to make but to direct the execution of colonial laws. One further step must needs be taken in the direction of oligarchy before the reaction was to set in. At the May Assembly it was enacted that as often as once a year a General Court should be held, at which it should be "lawful for the commons to propound any person or persons whom they desired to be chosen assistants. The like course to be holden when they, the said commons, should see cause for any defect or misbehaviour to remove any one or more of the assistants."<sup>2</sup> The right of regular annual election of assistants by the freemen had already been much impaired, but this obscurely worded act seems to go still further and substitute for the right of election the mere privilege of unauthoritative nomination or protest.<sup>3</sup>

It is to be noted that while this centering of power in the hands of the assistants was approaching its height, another oligarchic tendency took its rise which was to be far more enduring. Three years sufficed to replace the purely political oligarchy by a well-developed representative government. But an oligarchy resting upon a religious test was to continue practically without relaxation for almost three-score years. The franchise of the Company had heretofore been bestowed freely upon candidates in England and upon the "Old Planters" at Salem with no suggestion of a religious qualification.<sup>4</sup> At the first General Court held after the transfer of the charter, freedom was conferred upon one hundred and

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<sup>1</sup> 1631. Though the charter allowed the election of eighteen assistants, it was very seldom that more than half of that number were chosen, "the vacancies being kept for men of rank who were expected to come over." Palfrey, Vol. I., p. 383.

<sup>2</sup> Records, Vol. I., p. 87.

<sup>3</sup> Washburn (*Judicial History of Massachusetts*, p. 15), and Savage (*Winthrop*, Vol. I., p. 85, note) apparently see in this act no encroachment upon the rights of the freemen. Palfrey (*Compendious History of New England*, Vol. I., p. 123), and Doyle (Vol. I., p. 139) hold the contrary view.

<sup>4</sup> Records, Vol. I., p. 387.

nine applicants, among whom were many men of prominence "who were not of the churches."<sup>1</sup> Not until this court of 1631 was it enacted that "to the end the body of the commons may be preserved of honest and good men . . . no man shall be admitted to the freedom of this body politic but such as are members of some of the churches within the limits of the same."<sup>2</sup> Winthrop did not deem the passage of this law of enough importance to deserve his mention, yet no statute of the colony's first half-century struck so severe a blow at popular government, and none has brought upon the fathers of the colony so much reproach. It seems unwarranted to say that this law "actually disfranchised some who had hitherto enjoyed the rights of citizenship."<sup>3</sup> But from this time on citizenship was made an incident of church membership. A small minority here decreed that for time to come the government should continue in the hands of a small minority. A law so foreign to the spirit of our times can only be judged fairly when viewed from the standpoint of the age that gave it birth. The ideal which it

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<sup>1</sup> Hutchinson, Vol. I., p. 25. Prince, *Annals*, pp. 320 and 355, states, and the Records do not disprove, that these 109 simply gave notice at this court of their wish to take up their freedom, and that they were admitted at the next.

<sup>2</sup> Records, Vol. I., p. 87. Plymouth required no formal religious test of her freemen. In Connecticut all were freemen who were admitted by the majority of any township and took the oath of fidelity to the colony. In the Governor alone was church membership required. (Hollister's *History of Connecticut*, pp. 84-5.) In New Haven the two things insisted on by Davenport were that church membership must be a necessary qualification for citizenship, and that the Scriptures furnished a sufficient guide for the government of the body politic. (Doyle, Vol. I., p. 259.) Rhode Island's constitution of 1647 declared: "All men may walk as their conscience persuades them." (Doyle, I., 363.) "Massachusetts began with a very narrow policy. Only church members were allowed to vote." This statement of the late Dr. P. E. Lauer (*Church and State in New England*, p. 57) overlooks the fact that at the beginning of Massachusetts history, more than two years passed during which some two hundred freemen were admitted without the application of any religious test.

<sup>3</sup> Doyle, Vol. I., p. 259.

sought to realize must command the admiration of all. It aimed to establish a genuine *aristocracy*, a rule of the best. "Not birth, nor wealth, nor learning, nor skill in war was to confer the power, but personal character, goodness of the highest type."<sup>1</sup> That their conception of "the good life" was painfully narrow, that their test of character was utterly inadequate, cannot be denied. But these Puritans sincerely believed that only by restricting citizenship to Christian men in fellowship with their churches could they secure for the future loyalty to the common objects for which they had ventured and sacrificed so much. Hoping by the most unreliable of tests, subscription to a creed, to plight the allegiance of the future to the purposes of the past, they did not hesitate to adopt a course which must inevitably exclude three-fourths of their fellow-colonists from all share in the government, must secularize religion and ecclesiasticize politics, must excite perpetual friction, if not revolt, at home, while constantly inviting interference from abroad.<sup>2</sup>

Thus in a single year the powers of electing the chief officers, of law-making and law-executing, were transferred from the freemen to the assistants; the number requisite for the exercise of these extensive powers was reduced from seven to five or even less, and apparently all that the freemen could do to affect the make-up of this all-powerful court of assistants was to "propound whom they desired to be chosen," or to remove an assistant in case of misdemeanor. And now, narrow ecclesiasticism had joined hands with political oligarchy. It was high time for a reaction in favor

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<sup>1</sup> Palfrey, *History of New England*, Vol. I., p. 345.

<sup>2</sup> As to the secularizing effect upon religion, Edward Randolph, writing half a century later, says: "It is nothing but interest and design that draws most of the people into their church-membership and to think well of that religion and government they thrive under." (Hutchinson Collection, p. 484.)

Though non-church-members were excluded from the franchise, "every inhabitant in any town was liable to contribute to all charges, both in church and commonwealth, whereof he doth or may receive benefit." (Records, Vol. I., pp. 216-17 and 240.)

of popular government, and at the following Court of Election it came.

"True to English precedent, Massachusetts found the salvation of her constitutional liberties in a question of taxation."<sup>1</sup> Even after Boston had been determined upon as the center of government, the building of a pallisadoe for Cambridge, at public expense, was still persisted in as a defense of the frontier against the Indians.<sup>2</sup> To meet the cost of this fortification, by order of the Governor and assistants a rate was levied upon all the plantations.

Upon the arrival of the warrant levying £8 upon the inhabitants of Watertown, the minister and elder assembled the people of that little Puritan village, and, in words which breathed the spirit of Magna Charta and the recent Petition of Right, "delivered their opinions, that it was not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage."<sup>3</sup> At the next court these sturdy protestants were summoned before the Governor and assistants to answer for their recusancy. In this interview, instead of attacking the power exercised by the assistants on the ground that that body had ceased to be properly elected, they urged the less tenable objection that "this government was no other but as of a mayor and aldermen, who have no power to make laws or raise taxations without the people."<sup>4</sup> To this ill-directed attack Winthrop adroitly replied by

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<sup>1</sup> Doyle, Vol. I., p. 139.

<sup>2</sup> When this tax was voted (Feb. 3, 1632, Records, Vol. I., p. 93) it was the intention to make Cambridge ("the newe towne") the capital.

<sup>3</sup> Winthrop, Vol. I., p. 84. It seems clear that this protest was made purely as a matter of principle. Watertown had no less interest than the other towns in the protection of the frontier. Nor was it the apportionment of the burden which gave offense. In a preceding, as in the subsequent assessment, Watertown contributed without protest the same amount as Boston. (Winthrop, Vol. I., pp. 84 and 86, note.)

<sup>4</sup> *Ibid.* Doyle, Vol. I., p. 139, calls attention to the fact that in denying the validity of representation this contention really struck a blow at those popular rights which it aimed to defend.

explaining that "this government was rather in the nature of a parliament, and that no assistants could be chosen but by the freemen, who had power likewise to remove the assistants and put in others." In dialectics the men of Watertown were worsted. Says Winthrop: "they were fully satisfied; and so their submission was accepted and their offense pardoned."

But their protest had been made. Nor was it lost. The freemen were at last thoroughly aroused. An oligarchic spirit had been steadily growing which was all the more dangerous from the very fact that the conspicuous merit of the leaders bade fair to disguise their gradual usurpation of power. But at last the freemen saw their danger. Aristocracy might survive in Massachusetts, but the oligarchic power of the assistants had reached its zenith and must rapidly decline. The freemen were now in mood to assert their rights and govern themselves. Within less than two months an act was passed formally defining the Governor's powers.<sup>1</sup> At the next Court of Election the freemen voted that "the Governor and assistants should all be new chosen every year by the General Court," thus in form, at least, abolishing the practically life tenure of the assistants.<sup>2</sup> More important still—for in it lay the germ of representative government—was the enactment that every town should choose two men "to advise with the Governor and assistants about the raising of a public stock, so as what they should agree upon should bind all," etc.<sup>3</sup> Taxation was no longer to be determined by half a dozen of the wealthy "gentry." The people, through their town representatives, would now tax themselves.

Short as may seem the step from this representative tax commission to a representative General Court, comprising both deputies and assistants, the change which it involved in

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<sup>1</sup> April 3, 1632. Winthrop, Vol. I., p. 86.

<sup>2</sup> May 9, 1632. Winthrop, Vol. I., p. 90.

<sup>3</sup> Winthrop, Vol. I., p. 91. Records, Vol. I., p. 93.

the form of government was momentous. That no clerk, no historian, no diarist of that period betrays any surprise or unusual interest in this transformation clearly illustrates the faulty perspective often found in early colonial histories. Events which brought in their train a veritable revolution are hurried over with a mere passing notice.

So far as constitutional development is concerned, the record of the year 1633 is a blank. But the leaven of freer political thought was working, though in silence. Six weeks before the meeting of the General Court in May, 1634, notice having been sent out of the approaching Assembly, "the freemen deputed two of each town to meet and consider of such matters as they were to take in order at the same General Court."<sup>1</sup> This action was entirely without precedent. Who issued this formal notice of the approaching Assembly? By whose authority were the towns ordered to send deputies? Or did the towns await no summons, but of their own accord concert to send representatives? These are questions of the keenest interest, but which no historian of the time thought it worth while to answer.<sup>2</sup> Upon assembling, these deputies of the freemen "desired a sight of the patent," and finding that according to its provisions all their laws should be made at the General Court, they proceeded to take counsel with the Governor. If, as some have supposed, these deputies were present by the invitation of the Governor and assistants, it is very evident that Winthrop and his associates were prepared to make but slight concessions to them. The

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<sup>1</sup> 1634. Winthrop, Vol. I., pp. 152-4. Savage, in his note on this passage, thinks *three* should be substituted for *two* in Winthrop's text. At the court which follows there were evidently three delegates present from each of eight towns.

<sup>2</sup> The same careful editor (Winthrop, Vol. I., p. 153) conjectures that this summons was sent out by the assistants, who were becoming weary of the exercise of all the powers of government and wished others to participate in the responsibility. The aggressive mood manifested by the deputies from the very first, however, would seem to argue against their having met by invitation of the assistants.

Governor expounded to them the state of affairs about as follows: When the charter was granted, the number of the freemen was not greater than could conveniently meet and pass the laws. But now the freemen had so multiplied that the making and executing of laws must be effected by some form of delegation. Although "a select body to intend that work" would be necessary in the future, they were not as yet "furnished with a sufficient number of men qualified for such a business, neither could the commonwealth bear the loss of time of so many as must intend it." His suggestion for the present, therefore, was that the General Court should authorize the annual appointment, upon summons of the Governor, of a committee who should examine the laws and declare their grievances to the assistants; the consent of this committee should also be obtained to all tax assessments and disposals of public land.<sup>1</sup>

But the freemen were not to be put off with any such indirect participation in making their own laws. At the General Court which followed there appeared—without any previous summons, so far as records show—three deputies for each of eight towns.<sup>2</sup> It was the regular Court of Election, but more important matters than office-filling had brought these representatives together. First of all a new freeman's oath was formulated.<sup>3</sup> From this time forward, each candidate for freedom swore allegiance not to the Crown but to the colony. He pledged himself to the most implicit obedience to its laws, to the maintenance of its liberties, and to the conscientious performance of his duties as a citizen. The next step was to affirm in the strongest terms that none but the

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<sup>1</sup> Winthrop, Vol. I., p. 153.

<sup>2</sup> There were now sixteen plantations in the colony. The smaller and more distant settlements seem to have sent no deputies.

<sup>3</sup> Records, Vol. I., pp. 117 and 354. For the first freeman's oath see Records, Vol. I., p. 353. In 1665 the Court, yielding to the pressure of the Royal Commission, prefixed to the freeman's oath an oath of allegiance to the Crown.



General Court had power to admit freemen;<sup>1</sup> to elect, appoint or remove colonial officers, civil and military, or to define their duties and powers; or to raise money and dispose of lands. After this declaration of rights, the freemen were ready to proceed to the election of officers. For the first time in the history of the colony, Winthrop was passed over in the choice of Governor.<sup>2</sup> His aristocratic proposition that the freemen's share in law-making be confined to the mere declaration of grievances was still fresh in their minds.

Having renewed their charter rights and laid claim to yet larger powers, having supplanted the Governor, and rebuked the assistants by the imposition of certain fines on account of their arbitrary acts, it now remained for the freemen to establish the representative legislature upon a permanent basis. It was enacted that four General Courts should be held annually, to be summoned by the Governor, and not to be dissolved without the consent of the majority of the members. In the Court of Election every freeman was to "gyve his owne voyce." As regarded the other three courts, it was ordered that "it shall be lawful for the freemen of every plantation to choose two or three of each town before every General Court, to confer and prepare such public business as by them shall be thought fit to consider of at the next General Court, and that such persons as shall be hereafter so deputed by the freemen of the several plantations to deal in their behalf in the public affairs of the commonwealth, shall have the full power and voices of all the said freemen derived to them for the making and establishing of laws, granting of lands, etc., and to deal in all other affairs of the

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<sup>1</sup> According to the charter, the Governor with six assistants might admit freemen.

<sup>2</sup> At this court the written ballot was first used in Massachusetts political elections, the object of its introduction at this time having been, as is generally supposed, to conceal the opposition to Winthrop. In the margin of Winthrop's History (Vol. I., p. 157), opposite the notice of Dudley's election, is written "Chosen by papers."

commonwealth wherein the freemen have to do, the matter of election of magistrates and other officers only excepted.”<sup>1</sup>

Although “all things were carried very peaceably,” the changes which were accomplished during those three memorable days may truly be called revolutionary.<sup>2</sup> “The trading corporation had become a representative democracy.”<sup>3</sup> The freemen asserted their right to a far greater share in the government than they had hitherto enjoyed, and settled the legislative body upon a representative basis, which, with modifications of only minor importance, was to continue as long as the charter government. Indeed it is not too much to say that the two and one-half centuries which have since elapsed have not wrought such radical and beneficent changes in the government of Massachusetts as did that short session of the General Court in the year 1634.

Massachusetts was the second colony to make trial of representative government.<sup>4</sup> In Virginia a house of burgesses, the first representative body convened in America, had been assembled fifteen years earlier.<sup>5</sup> The other colonies for the most part arrived at representation only slowly and after a variety of expedients and compromises.<sup>6</sup> At first market government was the most simple and natural form. The

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<sup>1</sup> Records, Vol. I., pp. 118 to 120.

<sup>2</sup> Winthrop, Vol. I., p. 158.

<sup>3</sup> Bancroft, Vol. I., p. 246.

<sup>4</sup> Plymouth did not find representation necessary until 1638. See *infra*, cp. V., p. 70. In Connecticut a system of representation modeled on that of Massachusetts was adopted in the constitution of 1638.

<sup>5</sup> June, 1619. “Only in Virginia had the colony the needful materials for a representative assembly at the time when it first acquired the right of self-government.” Doyle, Vol. I., p. 138.

<sup>6</sup> An excellent summary of the steps by which representative government was reached in each of the colonies is to be found in Frothingham’s “Rise of the Republic,” p. 18, note. See also “History of Elections in the American Colonies” (1893), by Cortlandt T. Bishop,—an excellent monograph, to which reference has been impossible, as it came to hand only after the present study was in type.

freemen could easily assemble and in folkmoot transact what little business they did not choose to entrust to the Governor and magistrates. But the growth of Massachusetts had been exceptionally rapid. In this its sixth year the colony numbered between three and four thousand inhabitants, dwelling in not less than sixteen towns, the most remote of which was thirty miles from Boston.<sup>1</sup> For all the freemen from so wide a circle of towns to assemble at one time in Boston was clearly impracticable. The frontier would have been exposed to Indian attack. Even had it been possible, such a folkmoot would have been a most unwieldy and inefficient body for law-making.<sup>2</sup>

The Puritan colony outgrew the rule of Governor and assistants much more rapidly than its Pilgrim neighbor. This was largely due to the greater rapidity with which its population increased and spread into scattered settlements. Nor could Massachusetts satisfy her needs by the election of more assistants, for the charter restriction of that court to eighteen removed all elasticity by which it might otherwise have been developed into an adequate representative body.<sup>3</sup> It should not be overlooked, also, that in Massachusetts class lines were much more sharply drawn than at Plymouth. There were the "gentry" as distinguished from the "generality," and it was for the "gentry" that the assistants' positions were invariably reserved. From the pulpit the doctrine was preached that the assistant's right to his office was as inviolable as that of the private citizen to his freehold.<sup>4</sup>

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<sup>1</sup> Palfrey, *Compendious History of N. Eng.*, Vol. I., pp. 148-9. The colony had at this time between three and four hundred electors. Baneroff, Vol. I., p. 246.

<sup>2</sup> In a realization of this fact and in an appreciation of the ability of the natural leaders of the colony lies, doubtless, the explanation of the readiness with which legislative power was at first suffered to pass into the hands of the assistants.

<sup>3</sup> How the board of assistants was still further limited has been seen, *supra* p. 13 and note.

<sup>4</sup> This was the idea expressed in the Rev. John Cotton's sermon. Winthrop, Vol. I., p. 157 and p. 168.

The action of the freemen in 1634, in providing for the election of deputies to represent them in the General Court, was really, therefore, laying the foundation for a "Lower House." By the new arrangement the freemen were in a sense given double representation, the assistants standing for the colony as a whole, while in the deputies the special interests of town constituencies found expression.

Although the representative body was now in working order, many a question of how its efficiency might be promoted remained unsettled. There was as yet no thought of apportioning deputies according to the population of the towns.<sup>1</sup> Unlike the practice in our modern legislatures, residence within their constituencies was not required of the deputies.<sup>2</sup> For ten years both deputies and assistants sat together in one House, over which the Governor presided. As might have been anticipated, from the beginning, their respective rights and privileges proved a fruitful source of discord.

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<sup>1</sup> See *supra* p. 21. According to this law each plantation might send "two or three." Three seems to have been the number uniformly sent by the older towns. For many years the deputies were not entered by townships upon the records. Mr. Savage's note (Winthrop, Vol. I., p. 154) contains interesting information concerning the first deputies.

<sup>2</sup> For fifty years it was quite the custom for distant towns to choose as their deputies gentlemen living nearer the center of government. Thus Oxford (History of Oxford, p. 12) in 1693 chose as its first representative to the General Court, Daniel Allen, of Boston. Local residence was first required in 1694. Thus in 1653 Mr. Atherton, the Speaker of the House, was deputy for Springfield, though a resident of Dorchester. In 1671, Speaker Savage represented Andover, though living in Boston.

## CHAPTER III.

### THE FIRST DECADE OF REPRESENTATIVE GOVERNMENT.

The first decade of representative government in Massachusetts witnessed not only the gradual development of this newly instituted legislature, but also a more exact determination of the basis upon which representation was to rest. The law already required that all candidates for freedom be members of some of the churches within the colony.<sup>1</sup> But this restriction proved altogether too elastic. To the dismay of the orthodox Puritans it was soon found that by the organization of churches to suit almost every phase of belief the object of their religious test might be defeated. Accordingly, by a law of March, 1636, companies of men who were planning "to join in any pretended way of church fellowship," were required first to secure for their proposed foundation the approval of the magistrates and of the elders of the greater part of the churches. No members of churches formed without this joint secular and ecclesiastical approval were to be admitted to the freedom of the commonwealth.<sup>2</sup> Doubts as to what should constitute the proper basis for church-membership were presently removed by the enlightening labors of the synod of divines which met at Cambridge in August, 1637. "Nine unwholesome expressions and about eighty opinions, some blasphemous, others erroneous, and all unsafe, were condemned by the whole assembly."<sup>3</sup> "Henceforth," says Doyle, "orthodoxy in eighty-nine different articles was to be the needful condition of citizenship in Massachusetts."<sup>4</sup>

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<sup>1</sup> See *supra* p. 15.

<sup>2</sup> Records, Vol. I., p. 168.

<sup>3</sup> Winthrop, Vol. I., p. 284.

<sup>4</sup> Vol. I., p. 179.

The religious test for freemanship was not the first defense against "the world" which these shrewd Puritan leaders erected. The full and absolute control which the charter granted them over their territory they considered gave them the right to exclude all whom they thought undesirable settlers. "If we here be a corporation, established by free consent, if the place of our co-habitation be our own, then no man hath right to come in to us without our consent." This theory speedily found expression in law. At the second court of assistants held at Charlestown, Sept. 7, 1630, it was ordered that no person should plant in any place within the limits of the colony without leave from the Governor and the majority of the assistants.<sup>1</sup>

The various plantations were not slow in erecting each its own ring-fence of restrictions.<sup>2</sup> Business shrewdness no less than religious exclusiveness dictated these regulations.<sup>3</sup>

Early in 1634 another step was taken in the direction of ensuring the allegiance of non-freemen to the colonial government by the formulation of the "resident's oath," pledging loyalty and obedience to all the colony's laws. This was to be taken by all men over twenty years of age who should have been resident six months within the colony. A man refusing to take this oath was to be bound over to the next court, and upon a second refusal he might be banished.<sup>4</sup>

<sup>1</sup> Records, Vol. I., p. 76.

<sup>2</sup> The vexed question of the origin of the Massachusetts town is ably discussed in "The Genesis of the Massachusetts Town." (Proceedings of Mass. Hist. Soc., Jan., 1892.)

<sup>3</sup> *E. g.* "Agreed, by the consent of the freemen (in consideration there be too many inhabitants in the Town, and the Town thereby in danger to be ruinated) that no foreigner coming into Town, or any family arising among ourselves, shall have any benefit either of commonage or Land undivided but what they shall purchase, except that they buy a man's right wholly in the Town." (History and Genealogy of Watertown, p. 995.) A previous record in the same town had provided that "no foreigner... of England or some other plantation, shall have liberty to set down amongst us, unless he first have the consent of the freemen of the Town." (*Ib.*, 1634-5.)

<sup>4</sup> Records, Vol. I., p. 115.

For the first few years the matter of admission of inhabitants seems to have been left largely in the hands of the towns, subject to the general law of 1630 and to the taking of the resident's oath. A satisfactory watchfulness was ensured, as only freemen were allowed to vote on the receiving of inhabitants.<sup>1</sup> But as the settlements rapidly spread, the uniformity considered desirable in the standard of inhabitants became harder to maintain. Divers heresies, both political and theological, seemed threatening the very life of the little commonwealth. Boston gave an example, soon to be widely followed, when in her town-meeting it was agreed that no further allotments should be made to any newcomers, "but such as may be likely to be received members of the congregation."<sup>2</sup> The next year the General Court felt it necessary to ensure uniformity in this regard throughout the jurisdiction by the passage of a general law.<sup>3</sup> This was the famous "Alien Law of 1637," providing that: "No town or person shall receive any stranger resorting hither with intent to reside in this jurisdiction, nor shall allow any lot or habitation to any or entertain any such above three weeks except such person shall have allowance under the hands of some one of the Council or of two other magistrates."<sup>4</sup> Henceforward for the regulation of the admission of inhabitants, reliance was to be placed not on the spirit of self-protection in each community, but on rigid colonial law, enforced by heavy fines against any offending person or town.<sup>5</sup>

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<sup>1</sup> 1636, Records, Vol. I., p. 161.

<sup>2</sup> II. Rec. Com. Report. Boston Records 1634-1660, p. 5, Nov. 30, 1635.

<sup>3</sup> Though perfectly general in its provisions, this law had a special object clearly in view at the time of its passage. Among the passengers upon a ship soon to arrive were many friends of Wheelwright, well disposed toward the Antinomian heresy. It was for their reception that this cordial welcome was prepared. (Winthrop, Vol. I., p. 267.)

<sup>4</sup> Records, Vol. I., p. 196; Vol. II., p. 141. C. F. Adams, "Three Episodes in Massachusetts History," p. 459.

<sup>5</sup> The penalties were £100 for the offending town; £40 for the offending person. This law became the basis for much curious town

## 28 *First Decade of Representative Government.*

This much-vexed term, "inhabitant," seems to have included all male adults, not admitted freemen of the colony, on the one hand, nor servants, on the other, who by general laws or by special town acts were allowed to become permanent residents of the town.<sup>1</sup> The word was used with great indefiniteness; a "general meeting of the inhabitants" is the common expression applied to a town-meeting, in which as yet the freemen were the chief actors. The "inhabitant" was not necessarily a freeholder, *i. e.* "one who by purchase or inheritance had secured a right to a share in the common and undivided lands" of the town.<sup>2</sup> Again, the freeholder might or might not be a freeman; that depended not upon his owning land, but upon his being a church-member and taking the freeman's oath.

The narrowness of the Massachusetts colonial franchise

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legislation. Thus, "for the better preserving of religion and ourselves from the infection of error," the pious freemen of Lancaster covenanted "not to distribute allotments and to receive into the plantation as inhabitants any excommunicate or otherwise profane and scandalous (known so to be) nor any notoriously erring against the doctrine and discipline of the churches and the State and Government of this Commonweale." Lancaster Records, p. 28. In Groton, June 2, 1669, "the towne did solemlie determine to take in no more but a taylear and a smith," and upon further consideration it was the town's mind that "onely a smith and no other" should receive a grant from the town. (Early Records of Groton, p. 25. See also pp. 39, 57, 60 and 100.) "William Douglas is allowed to be a townsman, he behaving himself as becometh a Christian man." (Boston Records, 1634-1660, p. 55.) In Charlestown, 1636, Ralph Smith was "admitted a month on trial." (History of Charlestown, pp. 53-56.)

<sup>1</sup>This is practically the definition of "inhabitant" given by the Hon. Mellen Chamberlain. (The Genesis of the Massachusetts Town, p. 72.)

<sup>2</sup>George Wingate Chase, "History of Haverhill," p. 115. At a Boston town-meeting, May 18, 1646, it was voted by the freemen that all whom the townsmen had admitted to be inhabitants should have equal right of commonage, but that those who should thereafter be admitted inhabitants should have no right of commonage unless they hire it. II. Rec. Com. Report, p. 88. See also an Abstract of Laws of New England, first printed in 1755, Hutchinson Collection, p. 165.



is proverbial. Her freemen stubbornly resisted taxation without representation as applied to themselves, and then proceeded to impose taxes upon the unenfranchised while giving them neither part nor lot in the choice of their law-makers, a selfish inconsistency which the Plymouth freemen recognized and avoided from the first.<sup>1</sup> Yet it must not be thought that the unfree, though entirely excluded from the colonial franchise, had no direct means of making their needs and opinions known. Surely as early as 1641 it was provided by law that: "every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any court, council or town-meeting, and either by speech or writing to move any lawful, seasonable and material question or to present any necessary motion, complaint, petition, bill or information whereof that meeting hath proper cognizance, so it be done in convenient time, due order and respective manner."<sup>2</sup>

The ten years following the first choosing of deputies in Massachusetts witnessed a number of changes in election methods which demand brief mention, since by improvement in the election machinery the genuineness of representative government was ensured and its efficiency promoted.

As we have seen, an innovation was made in the primitive mode of electing colonial officers by erection of hands, or, in doubtful cases, by "polling the house," when in 1634 the written ballot was first applied to the election of Governor.<sup>3</sup> A year's trial of this new device proved so satisfactory, and the free choice of deputies was immediately seen to be of so great importance, that in 1635 it was enacted that in future deputies should be elected "by papers, as the Governor is chosen."<sup>4</sup> From this time the election of deputies by ballot

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<sup>1</sup> See *supra*, p. 16, note, also Plymouth law of 1638, *infra*, p. 70.

<sup>2</sup> "Body of Liberties," Mass. Hist. Soc. Coll., XXVIII., p. 218.

<sup>3</sup> See *supra*, p. 21, note. Records, Vol. I., p. 87.

<sup>4</sup> Records, Vol. I., p. 157.

was left to the several towns, the General Court merely determining the qualifications for service, providing general regulations to ensure the accuracy of returns, and prescribing penalties for illegal voting.

Up to this time at the Court of Election every freeman in the colony was expected to present himself at the place of assembly in Boston and take part in the choice of colonial officers. But as settlements spread, the assembling of all the freemen at once in the capital town left the frontier exposed to Indian attack. In the spring of 1636, therefore, at the time of the approaching election, the six frontier towns were "given liberty to stay so many of their freemen at home for the safety of their town as they judge needful, and that the said freemen that are appointed by their town to stay at home shall have liberty for this Court to send their voices by proxy." In the following year a law was passed making it lawful for all freemen in future to send their votes by proxy to the Court of Elections.<sup>2</sup> This law did more than obviate the danger of Indian attacks upon remote towns; it secured to them their proportional influence in the government. Without some such law, the freemen whom in increasing numbers necessity would detain at home, would have lost their votes entirely, and the franchises of the freemen living in and about Boston would have determined each election.

Throughout the first half-century of the colony's history the General Court was continually pottering with the question of how the assistants should be chosen. During the first decade the General Court seems to have nominated them, each name being presented separately for the vote of the whole assembly.<sup>3</sup> In 1640 a step was taken toward giv-

<sup>1</sup> Records, Vol. I., p. 166.

<sup>2</sup> *Ibid.*, p. 188.

<sup>3</sup> Thus, in 1635, Winthrop describes the election: "The Governor and Deputies were elected by papers, wherein their names were written; but the Assistants were chosen by papers without names, viz: the Governor propounded one to the people, then all went out and came in at one door, and every man delivered a paper into a hat, such as gave their vote for the party named gave in a paper with some figures or scroll in it, others gave in a blank." Vol. I., p. 190. See also Thos. Lechford's "Plain Dealing," pp. 60-61.

ing the people a more direct voice in the nomination of assistants. The new law provided that at the town-meeting in which the deputies were elected, the freemen should express their choice in the nomination of magistrates to be chosen at the approaching Court of Election. These preliminary lists of candidates, with the number of votes supporting each, were brought to the General Court, where they were compared and a new list of the required number of candidates made up from the names which had received most votes,

This official "slate" was referred back to the towns; upon each of these names, until the desired number had been chosen, the freemen voted at the Court of Election, either in person or by proxy.<sup>1</sup> A plan for nominating by special conventions of delegates was put in operation by the law of 1642, which provided that each town should choose one or two of its freemen who should meet for the definite purpose of nominating magistrates. No name that did not appear upon this official list was to be put to vote at the Court of Election.<sup>2</sup> The next year, however, this convention system was given up and the old method of preliminary nomination

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<sup>1</sup> Records, Vol. I., p. 293. The next year the General Court referred to the freemen a proposal by which in each town the freemen should vote for electors, ten votes being enough to elect one, who should "be sent to the Court with power to make election for all." (Records, Vol. I., p. 333.) Referring to this, Mr. Doyle (Vol. I., p. 338) says that "in 1641 the preliminary election was altered," overlooking the fact that this is the record not of a law but simply of a proposal which the deputies were to refer to the freemen "and make returns at the next Court, what the minds of the freemen are herein, that the Court may proceed accordingly." As no further action was taken at the next session, it seems clear that this proposal never became law. Mr. Doyle says that the powers of the electors here proposed "did not extend to final election." But the preamble of the act makes it evident that its purpose was to do away with proxy voting, and with the necessity of the freemen's going to Boston to attend the court. It would seem therefore, that "with power to make election for all the rest" meant "powers of final election."

<sup>2</sup> Records, Vol. II., p. 2.

in town-meetings as put in practice by the law of 1640 was revived, with the explanation that all the freemen should have equal liberty with the deputies in nominating candidates.<sup>1</sup>

Though the privilege of oral nomination was freely open to all voters, it demanded too great publicity to give satisfaction. By a law of 1644 this difficulty was obviated. At town meetings held several months in advance of the election every freeman in the colony was given "liberty to put in his vote for whom he thinketh fit" in the nomination of candidates for the magistracy. By an elaborate process these town votes, in sealed packages, were collected in the shire towns and finally sent to Boston, when with due ceremony the votes were counted and the seven names receiving the highest number were reported back to the towns; in the ensuing election each freeman "sent in his proxy" for or against each of these candidates and no others.<sup>2</sup>

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<sup>1</sup> Records, Vol. II., p. 37. Later in the same summer an order was passed that "for the yearly choosing of assistants for time to come, instead of papers the freemen shall use Indian beans, the white beans to manifest election, the black for blanks." (Records, Vol. II., p. 42.) "Putting in more than one paper or beane for the choyce of any officer" was punishable by a fine of £10. (Records, Vol. II., p. 48.) In 1647, the fine of Mighill Smith for "putting in three beans at once for one man's election" was remitted, "it being done in simplicity, and he being poor and of a harmless disposition." (Records, Vol. II., p. 179, see also Vol. IV., Pt. II., p. 100.)

<sup>2</sup> Records, Vol. II., p. 87. p. 175 and p. 210. With changes of minor details this law was re-enacted in 1646 and 1647. It seems probable that this list of "seven persons or as the Court shall direct," was simply drawn on to fill up the board of assistants to the desired number after each of the old assistants had been voted on. In 1647 twelve assistants were chosen, and the same twelve men were elected in 1648. Mr. Doyle (Vol. I., p. 339) speaks of this law of 1644 as having "relieved the freemen from the necessity of coming to Boston for the second election, by making the voting more local." But the freemen had already been relieved from that necessity in 1637 (Records, Vol. I., p. 88. *Supra*, p. 30); since then it had been entirely optional with each voter whether he would send in his proxy or appear at the Court of Election in person.

Rotation in office was never considered desirable in choosing Massachusetts assistants. The position called for no little legal knowledge and judicial poise, qualifications which were developed by service, so that an old incumbent was rarely supplanted by a tyro. A law of 1649 gave legal force to a custom, which seems to have obtained from the founding of the colony, of putting to vote in the Court of Election the name of each of the old magistrates before any new candidate could be propounded.<sup>1</sup> Such a law went far toward making the assistants veritable life-officers, so that, many years later, we are not surprised to find Randolph writing: "Whoever are in the magistracy do for the most part continue till death, by the help of persons of their faction, and of a law commanding that at every new election the former magistrates be first put to vote, upon penalty of £10."<sup>2</sup> Another premium was put upon long service by an act of 1653, bestowing upon the magistrates allowances in proportion to the number of years they had held office.<sup>3</sup> Partici-

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<sup>1</sup> Records, Vol. II., p. 286. This law raised to twenty the number of candidates to be nominated on the preliminary ballot.

<sup>2</sup> Letter of Edward Randolph. Hutchinson Collection, p. 500.

<sup>3</sup> The early magistrates seem to have served without pay, except that the "charges of their dyot" were defrayed from the public treasury or by fines. In 1638 each town was required to pay its members of the General Court, the magistrates receiving 3s. 6d. and the deputies 2s. 6d. for each day of the session. But in 1644 the deputies were ordered to advise with their elders and freemen "whether God do not expect that all the inhabitants of this plantation allow to their magistrates and all others that are called to country service a proportionable allowance, answerable to their places and employments." (Records, Vol. II., p. 67.) Divine sanction for an honorarium to the Assistants seems to have been discovered, for during the next ten years they were granted a liberal exemption from taxes. (Records, Vol. II., pp. 101 and 239.) Approval of permanence in the magistrate's position was shown by the law of 1653 which granted £30 per annum to each magistrate who had "borne the burden of that place for the space of ten years past"; those "of lesser standing" were to receive £20, and such as should be newly elected £15. (Records, Vol. IV., Pt. I., p. 154.) In the following year the allowance of £35 was made uniform for all assistants, and their exemptions from "town and

pation in the nomination of assistants was considered not merely the privilege but the duty of each town; those failing to send in their proxies were made liable to fine at the discretion of the court.<sup>1</sup>

Though the charter provided that "henceforth forever" there should be eighteen assistants, there had been few years when more than half that number were chosen. The smaller board was found adequate to the performance of the functions of the office. In the early years it was hoped that the vacancies in the magistracy might prove an inducement to English gentlemen to join the colonists. The desire to maintain the high standard in this important station was an additional reason for confining the magistracy to the few who were eminently qualified for the position. Recognizing the inex-

country rates" were renewed. (Records, Vol. IV., Pt. I., p. 204.) Besides the meager allowance, the magistrates received some perquisites, such as ferriage, etc., but these were mostly done away with when the salary was raised to £35. The dignity attaching to the office helped make it attractive. Assistants' "wives and children were left to their discretion in the wearing of apparel," in the famous sumptuary law of 1651. (Records, Vol. III., pp. 243-4.)

<sup>1</sup> Records, Vol. IV., Pt. I., p. 270. Subsequent changes in election methods had practically no effect upon the realization of representative government. See Records, Vol. IV., Pt. I., p. 347, and Vol. IV., Pt. II., pp. 32 and 468. For a single year the voting was entirely by proxy, none being admitted "to give votes personally at the day of election except members of the General Court" (1663, Records, Vol. IV., Pt. II., p. 86); but the next year brought a repeal of that act, as "not so satisfactory to the freemen as was expected." (*Ib.*, p. 134.) A few years later trial was made of a system which dispensed with the preliminary nomination (Records, Vol. V., pp. 261-2), but the following year the old system was practically restored. In town-meetings, votes for twenty-six candidates were cast. These ballots were sent to Boston, counted, and a list of the leading names reported back to the towns. For twenty of these candidates the freemen in town-meeting voted by Indian corn, which was then taken to Boston in sealed packets, each having the name of a candidate. On election day the corn of those who had not already voted was received and the entire vote counted, the eighteen having the highest number of votes being declared elected. (Oct., 1680, Records, Vol. V., pp. 291-2.) Such was the process of election until the cancelling of the charter.

pediency of the old charter requirement of eighteen assistants, in 1662, Charles II. ordered that in future the number should not exceed eighteen nor be less than ten, insisting that "regard be had of the wisdom, virtue and integrity of the persons to be chosen, and not of any affection with reference to their opinions and outward professions."<sup>1</sup>

The decade 1634-1644 witnessed the gradual solution, as occasion presented them, of many of the problems left unsolved in the organization of the crude legislative body. Thus, that the deputies must be freemen the voters of "Neweberry" learned by being fined sixpence apiece for sending a non-freeman to the General Court as their deputy.<sup>2</sup>

The towns which availed themselves of the permission to send deputies at first seem uniformly to have sent three. But the intention of making representation approximately proportional to population is soon seen,<sup>3</sup> and in 1636 it was enacted that no town having less than ten resident freemen should send any deputy to the General Court. Towns of from ten to twenty freemen might send but one deputy; towns of from twenty to forty, two; while those having more than forty freemen were allowed to "send three if they will, but no more."<sup>4</sup> Freemen of towns too small to send a deputy of their own might unite with some neighboring town in the choice of a representative.<sup>5</sup> From the very

<sup>1</sup> Records, Vol. IV., Pt. I., pp. 164-6.

<sup>2</sup> 1636. Records, Vol. I., p. 174, p. 221.

<sup>3</sup> 1635. Records, Vol. I., p. 157. Weymouth was allowed *one* deputy.

<sup>4</sup> Records, Vol. I., p. 178, Sept. 1636. The town of Weymouth, having sent three deputies to this court, "being a very small town," at the request of the said deputies, two of them were dismissed by the court. *Ibid.* It is important to notice that non-resident freemen, though taxed in the town, were not counted in the number on which the representation was based. See "The Genesis of the Massachusetts Town," p. 44, letter of Mr. A. C. Goodell, jr. (Proceedings of the Mass. Hist. Soc., Jan., 1892.)

<sup>5</sup> This was the custom under the Provincial Government, when "districts" were set off by the General Court, with the privilege

beginning of representative government, towns seem to have exercised a "liberty in sending or not sending deputies," but for neglect they were liable to a fine at the discretion of the court.<sup>1</sup> The great increase in the number of deputies, due to the founding of new towns, aroused the fear that they

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of uniting with the parent town in sending representatives. *E. g.* Carlisle was set off from Concord as a self-governing district, which should unite with Concord in choosing and paying representatives to the General Court. (Province. Laws, 1753-4, Cp. 36.)

<sup>1</sup> Winthrop, Vol. I., p. 362, n. With certain limitations the same has been true under the Provincial Government and under the State Constitution. Dover (Records, Vol. IV., Pt. I., p. 67) was "fined teene pounds for their neglect in not sending a deputy to this Court the last session nor this neither," 1651. The freemen of Watertown (1639, Records, Vol. I., p. 273) were fined £3 for sending their deputy away, "being to have attended the Court." The question whether the charges of the deputies were to be borne by the towns sending them or by the public at large had much to do in determining whether a town cared to send deputies or not. To a weak town the expense was considerably greater if it were called upon to pay its own deputies' expenses than if assessed for its share of the whole amount in a general tax. Hence we find towns trying to get out of sending deputies, preferring to be unrepresented than to bear their deputies' expenses. Thus Dover and Springfield were exempted from sending deputies except to the county elections. (Records, Vol. II., p. 41.) In 1693, the town of Groton was not a little stirred up over this question. February 6, "the inhabitants being met together for to Consider of sum waye for to preuent futar unnecessary charges did by uott declare that they would petishone unto the genarail Court that ther representetive might be relese from attending the Seshone any more." May 15, at a special meeting, "the town did by note declare that they would not send nor Choose any parson nor parsons for to Represent them at the great and genarail Corte of asembly. John page sener Jeams Kemp John Stone and William Longley se desent from this uote John farnworth and Steuen holden. The Town Resons is they do not iudg themself layable wether acordind to Law nor Charter." Yet October 30, the town proceeded to choose a deputy. (Early Groton Records, pp. 107 and 109.) In 1653, towns not having over 30 freemen were allowed for the future to "be at their liberty for sending or not sending deputies to the General Court." (Records, Vol. IV., Pt. I., p. 154.)

Under the first charter the law as to the pay of deputies was frequently changed. In 1636, "to ease the public" it was voted that deputies' charges be borne by the towns sending them. (Records, Vol. I., p. 183.) But in the following year "the former order for the charge of the deputies to be borne by the country"



would overbalance the assistants, and in 1639, against much opposition from the freemen on the ground that it was an infringement of their liberties, a law was passed limiting to two the number of deputies that a single town might send.<sup>1</sup> At the next session the opposition to this limitation was renewed, but proved unavailing.

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was re-established. (*Ib.* p. 187.) By a law of 1638 each town was to pay its own members of the General Court, the magistrates receiving 3s. 6d. and the deputies 2s. 6d. for each day of service. In 1639 the "charges of the dyot" of both deputies and assistants were to be borne by fines (*Ib.*, p. 261), but by act of 1643 the towns were to "satisfy the dyet" of the deputies by contributions of cattle, wheat, malt and barley. (Records, Vol. II., p. 101.) In accordance with a law passed a few months later, and re-enacted in 1653, the several towns, until the cancelling of the charter, paid their own deputies' expenses, either in money or in provisions. (Records, Vol. II., p. 140; Vol. IV., Pt. I., p. 154.)

<sup>1</sup> Records, Vol. I., p. 254. Winthrop, Vol. I., pp. 361-2. From this time Boston sends but two deputies. The rapid growth of that town made its representation very inadequate, and the court was repeatedly petitioned for permission to send deputies in proportion either to the number of freemen or to the number of churches. See Boston Records, 1661-1701; p. 26, 1665, and p. 133, 1679. In these "instructions" to the committee which was to present Boston's grievances before the General Court, emphasis was laid upon the fact that according to law a town having twenty freemen might send two, the maximum number of deputies, so that the freemen in excess of twenty in any town were entirely without voice in the legislature. "And shall 20 Freemen have equall priuiledge with our greate Towne, yt consists of neere twentie times twentie freemen, and beares theire full proportion of all publike charges?" This time they did not petition in vain. Permission to send a third deputy was granted. Records, Vol. V., p. 305. Boston Records, p. 145. Boston's apportionment was raised to four under William and Mary, and that remained her quota throughout the provincial period. Winthrop, Vol. I., p. 362, note.

Liberty was given to the towns, 1642, to send but one deputy each to the next session, but this experiment seems never to have been repeated. Records, Vol. II., p. 3. See also p. 209.

In 1651, upon motion of the deputy of Springfield in behalf of "their town," the General Court made it optional with the men of Springfield whether they would send a deputy to the latter session of the General Court each year, or not. Records, Vol. IV., Pt. I., p. 67. Two years later, towns having not more than thirty freemen were permitted to send deputies or not, as they should choose. The same statute required that every town represented in

In 1636 it was enacted that instead of four General Courts only two regular Assemblies should be held each year.<sup>1</sup> Deputies continued to be elected for each of these courts separately until seven years later, when for the first time it was proposed that the deputies should be chosen for an entire year, as were the assistants.<sup>2</sup>

During these years the deputies asserted for themselves many of the privileges which the English House of Commons had acquired. In the very first year of the remodeled General Court an act was passed making it lawful for the deputies meeting together before each General Court, to decide upon disputed elections of any of their number, and to "order things amongst themselves that might concern the well ordering of their body."<sup>3</sup> But a few weeks later occurred a characteristic rejection of duly elected members. Salem's deputies were sent back to their constituents and the town was disfranchised until her deputies should bring satisfaction for certain letters sent out by the church of

the General Court should bear the entire charges of its deputies. Records, Vol. IV., Pt. I., p. 154.

The rapid increase of the deputies was viewed with alarm by those who wished to preserve a carefully balanced government. Accordingly in 1644 there was submitted to the freemen of the various towns a very complicated scheme by which twenty deputies were to be chosen, being apportioned according to population among the four shires into which the colony had just been divided. Out of the twenty thus elected there were to be taken, in the order of the number of votes received, only a number of deputies equaling the number of the assistants for that year. It was hoped by this process to secure deputies of the highest ability. As deputies and assistants would be just balanced in number, the assistants promised to give up their "negative voice." Records, Vol. II., p. 88. Winthrop, Vol. II., pp. 262-3. This plan did not secure the approval of the towns and was never put in practice. At the next General Court the names of thirty-three deputies are recorded.

<sup>1</sup> Records, Vol. I., p. 170.

<sup>2</sup> 1643. Records, Vol. II., p. 47.

<sup>3</sup> 1635. Records, Vol. I., p. 142. Shortly before this, Mar. 5, 1635, a commission of five, appointed by the General Court, sent back two of the three Ipswich deputies, as "unduly chosen." Records, Vol. I., p. 135.

This power of the house of deputies alone to act concerning the election of its own members was formally conceded by the magistrates in the following note: "The magistrates think fit to declare

Salem, "wherin they had exceedingly vilyfyed the magistrates & deputies of the General Court"; or until those letters should be disclaimed by the majority of the freemen of the town.<sup>1</sup>

Far more important than any questions of apportionment, or of power to decide disputed elections, was the question of what should be the relation between the old board of assistants and the newly constituted body of deputies. The sending of deputies having taken its rise because of the arbitrary assumption of power by the assistants, it is natural that from the first the attitude should have been that of bitter jealousy. The General Court was indeed "a mixed company, part aristocracy and part democracy."<sup>2</sup>

Six months had not passed before these warring elements of the General Court crossed swords over the question of the removal of Mr. Hooker and his Cambridge congregation to Connecticut. In favor of their departure were the Governor, two assistants and fifteen deputies; opposed to it were the Deputy Governor, "all the rest of the assistants,"

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that the deputies . . . may supply their own company according to their liberty and the law established." 1647. Records, Vol. III., p. 119.

<sup>1</sup> Roger Williams was then pastor of the Salem church. Records, Vol. I., p. 156. Winthrop, Vol. I., p. 195. The controversy with Wheelwright in 1637 was the occasion of the dismissal of several deputies who upheld him. Records, Vol. I., pp. 205 and 236. Even disfranchisement and banishment were added in the case of William Aspinwall (p. 207). An interesting instance, free from such ecclesiastical prejudice on the part of the deputies, is found in Records, Vol. III., pp. 3 and 5.

<sup>2</sup> Johnson's "Wonder Working Providence," 1637. 2 Mass. Hist. Coll., Vol. IV., p. 22. Yet, despite the jealousy constantly manifest in the records of the General Court, the great influence which the "gentry" exercised over the "commonality" is shown in the institution (Mar., 1636. Records, Vol. I., p. 167) of a standing council, to which a certain number of magistrates should be elected for life. "The reason was for that it was showed from the word of God, etc., that the principal magistrates ought to be for life." (Winthrop, Vol. I., p. 219.) Winthrop, Dudley and Endicott were elected. The real motive of this innovation seems to have been a wish to institute some exclusive body, membership in which might prove attractive to Lord Brook and Lord Say and Sele,

and ten deputies. Since six assistants were not "in the vote," as required by the charter, no record was entered.<sup>1</sup> The deputies would not yield a veto to a minority of the court; on the other hand, the assistants clung firmly to their "negative voyce" as their only check upon the overwhelming numbers of the deputies. The dispute became violent. All business of the session was at a standstill. Finally, by the agreement of both assistants and deputies, recourse was had to the Puritan panacea for all moral and political ills, a day of fasting, humiliation and prayer. Mr. Cotton preached, upholding the authority of the magistrates, subject to an ultimate appeal to the people. So successful were his exhortations that "the affairs of the Court went on cheerfully; although all were not satisfied about the negative voice to be left to the magistrates."<sup>2</sup> Without conceding the principle in question, the deputies yielded in this special case.<sup>3</sup>

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whose coming they were anxious to secure, although unwilling to adopt the scheme for an aristocratic order, proposed by those gentlemen. (Doyle, Vol. I., p. 189.) This council served no useful purpose not already sufficiently provided for, and after three years all substance of its power was withdrawn. Records, Vol. I., pp. 167 and 264. Winthrop, Vol. I., pp. 219 and 364. Mr. Savage (Winthrop, Vol. I., p. 364, note) declares this the only instance in which election for life has obtained for any legislative or executive office in the United States.

<sup>1</sup> Winthrop, Vol. I., pp. 167 to 169. Of the whole body the vote was 18 to 16 in the affirmative. At the last Court of Elections, nine assistants had been chosen, but only seven of them "qualified" by taking the oath. Records, Vol. I., p. 118.

<sup>2</sup> Winthrop, Vol. I., p. 169. In this struggle with the "plebeians," the "patricians" found "no occasion for prodigies, or other arts of the priests of Old Rome. A judicious discourse from a well-chosen text was more rational, and had a more lasting effect." Hutchinson, Vol. I., p. 47.

Cotton's influence could always be counted on against democracy. In a letter to Lord Say (Hutchinson, I., Appendix 490-5) he writes, "Democracy I do not conceive that ever God did ordain as a fit government, either for church or commonwealth. If the people be governors, who shall be the governed? As for monarchy, and aristocracy, they are both of them clearly approved and directed in scripture, yet so as referreth the sovereignty to himself, and setteth up theocracy in both, as the best form of government in the commonwealth, as well as in the church."

<sup>3</sup> In 1636 there was devised a way of averting the constantly impending danger of a deadlock. A joint committee, composed of an equal number of deputies and assistants, might be chosen, who

Tradition tells of notable services rendered by animals in certain great national crises. A wooden horse was the destruction of Troy. A flock of cackling geese was the salvation of Rome. But not until the middle of the seventeenth century does sober history tell us of the service of a stray sow—and perhaps a dead sow, at that—in hastening on the solution of a great constitutional controversy. This came about by reason of the legislature's being the supreme court of appeal within the colony. In the year 1636 there was brought to Captain Keayne, a wealthy but crabbed citizen of Boston, a stray sow. Though he had it cried a number of times, no owner appeared. After keeping it for a year in a yard with a sow of his own, a poor woman named Sherman laid claim to it, but did not come to see it until the Captain had killed his own sow.<sup>1</sup> Finding then that the surviving sow did not answer to the description which she had given of her own, she circulated the story that he had killed hers. This caused much talk, and presently the case "was brought before the elders of the church as a matter of offence." Keayne was cleared. Urged on by others (principally by one George Story, who "kept in her house," and had recently been brought before the Governor on complaint of Captain Keayne, "as living under suspicion"), Dame Sherman brought suit against Keayne in the inferior court at Boston. Not only was the Captain again cleared, but the jury awarded him £3 for his costs, and upon his bringing a counter-suit for slander, he having been charged with stealing the woman's sow, he was given a verdict of £20.<sup>2</sup>

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with an umpire, selected by themselves, might decide the question at issue. In a heated controversy only the majority of assistants and of deputies would tend to be represented on the opposing sides of this committee, so that the real decision would be thrust upon one man, the umpire. It was a poor palliative, not a cure of the real difficulty. Records, Vol. I., p. 170.

<sup>1</sup> Dame Sherman was no "poor widow," as Doyle (Vol. I., p. 31) calls her. Her husband was at this time in England (Winthrop, Vol. II., p. 84), but the suit was brought in his name, and in the later stages of the case he conducted it.

<sup>2</sup> Instead of putting an end to the case, this verdict was just what kept it from lapsing. Popular sympathy never could look

The next appeal was to the General Court. Here it was that pork and politics first came in contact. The case aroused all the old clashing between deputies and assistants, and speedily showed how ill fitted is an elective legislature to serve as a judicial body. Feeling ran high. There can be no doubt that the weight of evidence and the fact of legal possession were on the side of Captain Keayne. He was, moreover, a man "very useful to the country both by his hospitality and otherwise." "But," says Winthrop, "one dead fly spoils much good ointment,"—the Captain was "of ill report in the country for a hard dealer in the course of his trading"; by both court and church he had been censured for his sharp practices, and now when his opponent was a poor woman, popular sympathy instantly arrayed itself against him. Seven entire days did "the Great and General Court" devote to this case, yet was no decision reached. In 1636 it had been enacted that no law, order or sentence should pass as an act of the court without the consent of a majority of assistants and also of a majority of the deputies.<sup>1</sup> But when, in this famous case, it was "propounded to vote; whether the defend<sup>t</sup> bee found to have bene possest of the plaintiff's sowe & converted her to his owne use, or not: it was voted by 2 ma<sup>trats</sup> & 15 deputies for the plaintiffe, & by 7 ma<sup>trats</sup> & 8 deputies for the defend<sup>t</sup>, & 7 deputies were newters,"<sup>2</sup> refraining from voting, in accordance with instructions from their constituents. Thus a majority, not only of the deputies, but of all voting was in favor of the plaintiff, by a vote of seventeen to fifteen, but in the face of the opposition of the "greater parte of the magistrates," no verdict could be rendered. At this result there was much outcry against the negative voice of the magistrates on the ground that it alone had hindered a poor woman's obtaining justice. This called from one of the magistrates a vigorous defense of their veto power.

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at it in any other light than that Dame Sherman had been fined £20 for trying to recover her own property.

<sup>1</sup> Records, Vol. I., p. 170.

<sup>2</sup> June 14, 1642. Records, Vol. II., p. 12.

After having come before church, court and assembly, "the sow business not being yet digested in the country," the elders felt called to meddle with it.<sup>1</sup> For the express purpose of settling this matter they summoned a great meeting which was attended by almost all the ministers and magistrates in the colony, as well as by many deputies. But for once a question had been found which baffled the omniscience of the Massachusetts elders. They gave the case up as hopelessly complicated, and "earnestly desired that the court might never be more troubled with it."<sup>2</sup>

On the plea of new evidence, however, the General Court was petitioned for another hearing. Sympathy for the poor as against the rich, and also the desire for definite victory in their controversy with the assistants, led the deputies to favor the renewal of the case. Fortunately some friends of Captain Keayne succeeded in persuading him to restore to his prosecutor the few pounds which he had taken under the old verdict, and so after seven years of agitation this dispute was settled out of court.

But by far the most important point in this "politico-porcine case" remained still undecided. The deputies clamored for the repeal of the assistants' veto power. One of the assistants wrote a pamphlet strenuously maintaining its necessity and usefulness "by many arguments from scripture, reason, common practice, etc.," but another assistant published a sharp rejoinder, which claimed to avoid all those arguments.<sup>3</sup> In this confusion, at the request of the assistants, recourse was again had to the elders—that oracle to which the Puritans ever turned for infallible counsel on subjects legal and political no less than religious. Again the elders succeeded in soothing the freemen and their deputies, so that the question at issue was once more left undecided.

But the following year, 1644, when the heat of controversy

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<sup>1</sup> Winthrop, Vol. II., p. 139.

<sup>2</sup>*Ibid.*

<sup>3</sup> Governor Winthrop, who from the beginning had been vigorously opposed to a mere majority's exercising controlling power, also entered the lists as a pamphleteer and "set forth a writing about the sow business" which gave such offense because of its

was past, and the question of the veto was no longer redolent of pork, upon motion of the deputies, but apparently with no decided opposition, it was enacted that in future the General Court should sit and vote in two chambers; bills might originate with either the assistants or the deputies, the approval of a majority in each chamber being necessary to the passage of any act.<sup>1</sup> "This change," says Palfrey, "not by hurtfully withdrawing a power from the magistrates as had been attempted, but by beneficially conferring an equal power upon the deputies, determined the great contention about the negative voice, and completed the frame of internal government of Massachusetts, destined to undergo no further organic change for forty years."<sup>2</sup>

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oracular tone that he felt constrained to apologize to the General Court for its publication, acknowledging that in his language "he did arrogate too much to himself and ascribe too little to others." Winthrop, Vol. I., pp. 141-2. This interesting manuscript may be seen in the library of the American Antiquarian Society, at Worcester, Mass. For Winthrop's pamphlet on the veto, see *Life of W.*, Vol. II., p. 427, and *Doyle*, Vol. I., pp. 251-8.

<sup>1</sup> March, 1644. Records, Vol. I., pp. 58-9. The preamble of this important act runs thus: "Forasmuch as, after long experience, we find divers inconveniences in the manner of our proceeding in Courts by magistrates and deputies sitting together, and accounting it wisdom to follow the laudable practice of other states who have laid groundworks for government and order in the issuing of business of greatest and highest consequence, It is therefore ordered," etc.

An unforeseen difficulty soon required the modification of this law. The assembly was not merely a legislative body, but the highest court of appeal, and it was found that under the operation of this law many cases must remain undecided. By a concession of the magistrates it was finally provided that "if there should fall out any difference" between magistrates and deputies in any case of judicature, civil or criminal, it should be determined by the major vote of the whole body. (1652. Records, Vol. III., p. 179, Vol. IV., Pt. I., p. 82. Hutchinson, Vol. I., p. 143.)

<sup>2</sup> *Compendious History of N. Eng.*, Vol. I., p. 259. The principal authorities upon this controversy are Winthrop, Vol. II., pp. 83-6, 139-144, 193. Records, Vol. II., pp. 12, 51, 58-9. Hutchinson, Vol. I., pp. 143-4. Bancroft, Vol. I., p. 248. Washburn, p. 22. Doyle, Vol. I., pp. 343-4. Lodge, p. 351.

The Plymouth legislature continued to sit as one body throughout



In the Court of Election which soon followed, John Endicott was chosen Governor and John Winthrop, Deputy Governor. Eleven assistants were chosen, and thirty-nine deputies attended the court.<sup>1</sup> The house of deputies proceeded to organize by the choice of a presiding officer, ever since called the Speaker, and a law was straightway passed prohibiting any outside restraint upon the deputies.<sup>2</sup>

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its history. In Connecticut the division into two houses took place in 1645.

In 1646 there seems to have been some agitation in favor of reuniting the branches of the Massachusetts legislature, but it was finally decided that the "House of Deputies should continue in their setting aparte & acting ap'te from the magists." Records, Vol. III., p. 62.

<sup>1</sup> Records, Vol. II., p. 66. The colony, with its dependencies, now comprised thirty plantations, a large number of which evidently sent no deputies. Records, Vol. II., p. 38, May, 1643.

<sup>2</sup> Mr. William Hawthorne of Salem was the first Speaker. Winthrop, Vol. II., p. 63. In May, 1644, "It is ordered that no member of this House shall be called to the bar but by the major vote thereof, and being first convicted of his offence." Records, Vol. III., p. 3.

Another controversy between the deputies and assistants arose over the question of who composed the "Standing Council of the Commonwealth." In 1643 (Records, Vol. II., p. 46) the General Court, at its adjournment, committed the affairs of the colony, in the interval before the next court, to a committee consisting of the assistants together with the deputies of Boston and the four neighboring towns. But the assistants claimed to be constituted by patent the "Standing Council." When the dispute was renewed in 1644 the deputies conceded for the time being that the Governor and assistants should act as the Council. At a later session in the same year the matter received a thorough discussion, the elders being called in to arbitrate. They maintained that both by patent and by the election of the people the assistants were the "Standing Council of the Commonwealth" in the vacancy of the General Court. They then proceeded, at the request of the Assembly, to expound the division of powers. The legislative and supreme judicial power, they said, belonged to the General Court, consisting of Governor, assistants and freemen, acting through their deputies. To the Governor and assistants belonged all other judicial power (except appeals and removals from office), being conferred not by vote but by the patent. The freemen, however, determined by their election in whom this power should be vested. These propositions were discussed and approved by the General Court. Records, Vol. II., pp. 90-6. Winthrop, Vol. II., pp. 202-6, 250-7.

## CHAPTER IV.

### REPRESENTATION AND SUFFRAGE. 1644-1689.

The powers which were exercised by the General Court during the second half of the seventeenth century are well summarized by a sharp critic of Massachusetts institutions. In 1676 Edward Randolph reported that legislative power was vested in a General Court consisting of Governor, Deputy-Governor, Assistants and Deputies, all elected annually. Besides being the supreme judicature of the colony, this General Court had power to "make laws, raise money and lay taxes upon the whole colony, dispense lands, give and confirm properties, impeach, sentence and pardon, and receive appeals from all inferior courts, and could not be adjourned or dissolved without the consent of the major part." The Governor had a casting vote in all Assemblies, and the Governor and assistants constituted the executive power of the colony.<sup>1</sup>

It is hard to see why special provision need have been made for the orthodoxy of deputies while church-membership was still a condition of admission to the franchise; yet before any relaxation of that requirement had been made, the pious fathers of Massachusetts, seeing that "the safety of the commonwealth, the right administration of justice, the preservation of peace and the purity of the churches of Christ, under God, doth much depend upon the piety, wisdom and soundness of the General Court, not only magistrates but deputies," decreed that in the future "no man, although a freeman, shall be accepted as a deputy in the General Court that is unsound in judgment concerning the main

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<sup>1</sup> Hutchinson Collection, p. 477.

points of the Christian religion as they have been held forth and acknowledged by the generality of Protestant orthodox writers, or that is unfaithful to this government." Any freeman who should knowingly vote for such an unfit candidate was liable to a fine of five pounds.<sup>1</sup> Another restriction equally foreign to our present ideas of the qualifications of a deputy was that which excluded from the lower house "any person who is a usual and common attorney."<sup>2</sup> This had its temporary justification in the fact that the General Court, serving as the court of appeal, would deal with many cases in which these lawyers were interested parties. Promptness and regularity of attendance were required of the deputies under penalty of heavy fines.<sup>3</sup>

The upper house of the General Court underwent little change. In *personnel* and in sentiment it was a much more aristocratic body than the house of deputies. Both legal knowledge and executive ability were requisite in this office, and the freemen, in seeking for the most eminent candidates upon whom to bestow this high dignity, found the greater part of them among the rich and highly educated citi-

<sup>1</sup> 1654. Records, Vol. IV., Pt. I., p. 206. A prosecution under this law is noticed, *Ib.*, p. 263. Prominent as was ecclesiastical influence upon politics, service at the same time in ecclesiastical and political office seems to have been avoided. As early as 1632 the Boston congregation sought advice from her sister churches of "Plymouth, Salem, etc.," "whether one person might be a civil magistrate and a ruling elder at the same time." This was "agreed by all negatively," but there was no unanimity as to which should be laid down. (Winthrop, Vol. I., p. 97.) In Boston, 1650, a special town-meeting was called to elect a deputy "in the stead of James Penn who was chosen by the church for other service." (2d Rep. of Bos. Rec. Com., p. 100.)

<sup>2</sup> Records, Vol. IV., Pt. II., p. 87.

<sup>3</sup> Records, Vol. IV., Pt. I., p. 203. £100 fine if absent during the first three days of the session. This statute provided for careful returns from the elections. By a later law (*Ib.*, p. 261) deputies chosen for but one session were denied the same "benefit of lawe" as those chosen for the whole year. The fine for an assistant's absence without the consent of both houses was 30s. *per diem*, double that of a deputy. Records, Vol. IV., Pt. I., pp. 20-24.

zens of Boston and the neighboring towns. The conservatism natural to such a body of men was strengthened by the manner of their election, which practically ensured them life-tenure of office.<sup>1</sup> Thus while elected annually as representatives of the whole colony, the assistants formed practically a permanent body of well-to-do gentlemen mainly from one locality. On the other hand, while residence in one's constituency was not yet required, the deputies came from all sections of the colony and reflected its every shade of opinion. It was inevitable that bodies so differently constituted should often find themselves in disagreement. Thus in 1683, when the colony was summoned by a writ of *quo warranto* to appear in behalf of its charter, the assistants, coming from the section most affected by intercourse with England, were in favor of submission; the deputies, however, stood for stubborn resistance.<sup>2</sup>

Some account has already been given of the religious test introduced by the law of 1631, and of the later enactments which tended to make that test the more odious.<sup>3</sup> In a rapidly developing community such laws could not long remain unchallenged. Agitation soon began for the removal of dissenters' civil disabilities. In 1644, at the suggestion of the Commissioners of the United Colonies, there was submitted to the General Court a proposition "yielding some more of the freeman's privileges to such as were no church-members that should join in this government."<sup>4</sup> Though nothing was then determined, it was a decided gain that it had come to be recognized that non-members had grievances

<sup>1</sup> *Supra*, p. 13, note 1.

<sup>2</sup> Mass. Hist. Coll., 3d Series, Vol. I., p. 74. The spirit of the two bodies is illustrated by an incident in the year 1685. The Treasurer having refused to serve, the assistants proceeded to choose a successor, "but the Deputies would have it done by the Freemen that their Priviledges may not be clipt, as many of them have of late beene." Sewall Papers, Vol. I., p. 100.

<sup>3</sup> *Supra*, pp. 14 and 25.

<sup>4</sup> Winthrop, Vol. I., p. 193.

worthy the attention of the Court. From this time to the day of their removal they were not allowed to be forgotten, but entered constantly into colonial politics.<sup>1</sup> Two years later Winthrop tells us that an act was on the point of passing which might modify somewhat the qualifications for freedom, and would allow non-freemen equal power with freemen in all town affairs.<sup>2</sup> But the over-zeal of certain dissenters put an end to all spirit of concession. Just at this inopportune time there was presented a petition signed by a number of gentlemen of position and intelligence, praying that distinctions which had been maintained both in civil and church estate might be removed, that they might be governed by the laws of England, and that members of the churches of England and Scotland might be admitted into communion with the churches of the colony. If their petition were not granted they declared they would be obliged to appeal to Parliament. They pressed for an immediate answer, but the matter was put over to the next court. An attempt to carry out their threatened appeal was frustrated by the seizure of their two delegates on the eve of their departure.<sup>3</sup> Search of their papers brought to light two peti-

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<sup>1</sup> The assistants seem to have been more favorably inclined to the cause of the unenfranchised than were the deputies, but avoided allying themselves with this *majority* of the inhabitants out of fear of making themselves obnoxious to the freemen—the *minority*, which elected both deputies and assistants. *Ib.*, pp. 208 and 209, note.

<sup>2</sup> *Ibid.*, p. 321.

<sup>3</sup> The petition and other documents connected with this episode may be found in "New England's Jonas Cast up at London." (Peter Force's "Tracts and other Papers," Vol. IV.) See also Winthrop, Vol. II., p. 319. Prominent among the signers was Mr. Samuel Maverick, who had been admitted to freedom at the first General Court in Boston. (*Supra*, pp. 14 and 15.) Winthrop declares him "worthy of a perpetual remembrance" for his good deeds (*Ib.*, Vol. I., p. 143), but he had never been chosen to any office, being an Episcopalian. His offense in being connected with this petition was considered "far the greater because he had taken the oath of fidelity to the government, and enjoyed all liberties of a freeman." *Ib.*, Vol. II., pp. 353 and 367.

tions, and a set of queries to be resolved by Parliament, which gave great offense to the General Court.<sup>1</sup> Heavy fines and imprisonment were imposed upon the petitioners.

It would be far from just to regard the summary treatment which these dissenters received as due simply or mainly to their plea for an enlargement of their political and religious privileges. It was in their attempted appeal to Parliament that their real offense consisted. The allowance of such an appeal would have been tantamount to yielding what the Massachusetts colonists would never concede, that their government, within the limits marked out by the charter, was not absolute. Under any circumstances an attempted appeal would have met fierce opposition, but just now it was especially dangerous; for at this time ecclesiastical affairs were in a very unsettled condition in England, and agitation on the part of the petitioners might very possibly have led to the setting up of Presbyterianism in Massachusetts, a result which would have been a far greater hardship to the body of Massachusetts citizens than the existing system placed upon the unenfranchised.<sup>2</sup> There was another point upon which the petitioners and the colonial authorities squarely joined issue. The petitioners claimed that the liberties and privileges in the charter belonged to all free-born Englishmen living in the colony; whereas their opponents maintained that the charter originally conferred these powers and privileges upon a limited company of freemen, with the right of self-extension, and that therefore it was

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<sup>1</sup> In this exigency Mr. Edward Winslow of Plymouth was sent to England to appease the ill-will which this agitation bade fair to arouse in Parliament. So successful was his mission that not only did the non-free petitioners receive no encouragement, but assurance was given by the Committee of Lords and Commons that it was not their intention "to encourage any appeals from your justice, nor to restrain the bounds of your jurisdiction to a narrower compass than is held forth by your letters patent." Winthrop, Vol. II., p. 389.

<sup>2</sup> See Doyle, Vol. I., p. 373. Palfrey, Vol. II., p. 169. How real were the grievances of dissenters is feelingly pictured by Thomas Lechford, "Plain Dealing," 1647, ed. by J. H. Trumbull, p. 59.

right that they should be granted only to such as the Governor and company should think fit to receive into that fellowship.

That the relatively small proportion which the freemen bore to the total adult male population was due in large measure to other causes than Puritan bigotry is conclusively shown by Edward Winslow, the skilful apologist who was sent to England to conciliate Parliament and the Commissioners. He writes: "And however there are many that are not free amongst us, yet if understanding men and able to be helpful it's more their own faults than otherwise oft-times who will not take up their freedom lest they should be sent on these services; and yet it is the same with many thousands in this kingdom (England) who have not liberty to choose; nor yet may the freeholders choose any that are not freeholders, freemen and gentlemen of such a rank as are chosen."<sup>1</sup>

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<sup>1</sup> "New England's Salamander Discovered," 1647. Mass. Hist. Coll., 2 Series, Vol. III., p. 137. Apparently Winslow includes only members of the orthodox Puritan churches as "understanding men and able to be helpful"! But that he was warranted in saying that many refused to become freemen from a wish to avoid the duties involved appears from other records. In 1643 the court ordered that "the churches should be written unto, to deal with" any members who should refuse to take up their freedom. (Records, Vol. II., p. 38.) Apparently this "dealing" was too mild, for three years later, "there being within this jurisdiction many members of churches, who, to exempt themselves from all public service in the commonwealth, will not come in to be made freemen," it was ordered that such members should not be exempted from public service, and in case of refusal to serve in any office to which they had been elected, they should be liable to the same fine as regular freemen. (Records, Vol. II., p. 208.) There was much force also in Winslow's reference to the restricted suffrage in England at this time. The tests were less odious, but it may be doubted if the proportion who could exercise the suffrage in England (having gained the right by birth, purchase, marriage, apprenticeship, possession of property or by membership in some guild or trade corporation) was much greater than in Massachusetts. (Frothingham's History of Charlestown, p. 50, n. 2.)

What petitions and threats were thus unable to secure from Massachusetts she readily granted in special instances when an opportunity was presented of enlarging her borders. Massachusetts was ever an aggressive colony, and the religious test was not allowed to stand in the way when insistence upon it would have prevented the acquisition of valuable territory. As early as 1639 the inhabitants of Dover made overtures to the General Court for incorporation with the Bay colony. The settlements upon the Piscataqua were too weak to be self-dependent, and too inharmonious to unite in defense. In coming under the jurisdiction of Massachusetts they had hope of enjoying a better ordered government. Accordingly the proprietors yielded their rights to the General Court, and commissioners were sent to secure the submission of the inhabitants. The point of special interest to us in this transaction is that "though they bee not at present church-members," all the inhabitants of these towns who had been "free" there were immediately "to enjoy the like liberties as other freemen do within the said Massachusetts government," were to manage their own town affairs, and were allowed to send two deputies "from the whole ryver" to the General Court at Boston.<sup>1</sup> The next year the inhabitants of Exeter were received upon equally liberal terms.<sup>2</sup> Ten years later, with very little variation, Massachusetts employed this process of absorption in the case of the Maine settlements. A little insistence persuaded the inhabitants of Kittery to submit; upon taking the freeman's oath they were granted the full franchise of Massachusetts without the imposition of any other test, and were given permission to send a deputy to the General Court.<sup>3</sup> Other towns followed this

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<sup>1</sup> Records, Vol. I., pp. 325, 343; Vol. II., p. 29. Winthrop, Vol. I., p. 185; Vol. II., pp. 45, 50 and 51.

<sup>2</sup> Records, Vol. II., p. 43.

<sup>3</sup> 1651. Records, Vol. IV., Pt. I., pp. 122-6 and 129. In the case of Wells, Saco and Cape Porpoise the privilege of sending a deputy is not specially mentioned. Palfrey (Hist. of N. Eng., Vol. II., p. 387) says that these towns did not as yet receive that privi-



example, and in 1658 the submission of the Maine settlements was complete.

This aggressive territorial policy had more far-reaching results than the bringing of all the settlements north of Plymouth under the sway of Massachusetts. By each of these successive bestowals of citizenship it was virtually conceded that the religious test, still insisted on at home, was not an essential qualification for admission to the franchise. Quite a large proportion of the freemen now under the government of Massachusetts had been admitted upon the mere taking of the freeman's oath, and this must have not only increased the well-founded discontent of the dissenters, but must have also supplied them with partisans in the very center of authority.<sup>1</sup>

How decided a break Massachusetts here made with her policy of requiring religious conformity as a condition of citizenship appears only when it is seen how few even of the church members among the newly admitted freemen can have been in sympathy with her Puritan system of worship. Of the New Hampshire settlements, Dover to be sure was Puritan, but the church at Strawberry Bank was Anglican, while Exeter was an Antinomian colony which had been founded by Wheelwright, the heretic leader whom Massachusetts had recently been at great pains to banish. The Maine settlements followed the Anglican form of worship; indeed, in the formation of the Confederation of 1643 the fact that "those beyond Pascataquack ran a different course from us both in their ministry and civil administration" was given as the all-sufficient reason for their exclusion from that league. Yet only a decade later, Puritan Massachusetts received Anglican Maine to her bosom!

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lege. Wells, however, sent one in 1654 and Saco in 1659. It seems not unlikely that they did not send them earlier because unwilling to bear their expenses, as the law then required.

<sup>1</sup> The Maine settlements alone contributed 166 freemen, and in the General Court of 1659 four out of the thirty-four deputies represented constituencies where the religious test had not been required.

Though the dissenters' attempt to force an entrance into the Puritan stronghold had resulted only in failure, it was soon followed by a liberalizing movement within the Congregational church itself which tended to make the conditions of membership, and hence of freedom, less rigorous. A synod of Massachusetts and Connecticut divines in 1657 decided that parents who had been baptized in infancy and who, having led exemplary lives though without having completed their church connection, "would own for themselves their baptismal vows," "ought to be allowed to present their children for baptism." This assuming of baptismal obligation was called by opponents 'taking the Half-Way Covenant.'"<sup>1</sup> This was virtually recognizing a partial church-membership in persons who had made no formal profession and subscribed to no creed. In neither colony was any legal efficacy given to the decision. In Massachusetts five years later the same opinion was reaffirmed by the clergy, and the General Court ordered the "result of the Synod" to be printed, and "commended the same unto the consideration of all the churches and people of this jurisdiction."<sup>2</sup> Here ended legislative action on the matter.<sup>3</sup> There was no statutory change of the basis of the franchise, but as individual churches gradually adopted more liberal conditions of admission and were therein sanctioned by the General Court, it resulted that the operation of the religious test became less odious and the suffrage was not a little broadened.<sup>4</sup>

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<sup>1</sup> Palfrey, "Compendious History," Vol. II., p. 19.

<sup>2</sup> Records, Vol. IV., Pt. II., p. 60.

<sup>3</sup> The statement, "The decision of the clergy was approved by the General Court of Massachusetts in 1662, which decided the question of citizenship for this colony" (Lauer, *Church and State in New England*, J. H. U. Studies, Tenth Series, II-III., p. 59) seems to the writer to exaggerate both the action of the General Court and its effect.

<sup>4</sup> Records, Vol. IV., Pt. II., p. 493. Palfrey, Vol. II., p. 489. Doyle, Vol. II., pp. 248 and 460.

While the religious test was being thus assailed by petitions, by the dictates of policy and by the liberalizing movement within the church itself, the privileges open to non-freemen had been not a little extended. In 1647 the General Court, "taking into consideration the useful parts and abilities of divers inhabitants amongst us, which are not freemen, which, if improved to public use, the affairs of this commonwealth may be easier carried (to) an end," voted that non-freemen of twenty-four years or over, of good character, who had taken the oath of fidelity, might act as jurymen, vote on local affairs in town-meetings, and be chosen to town offices, provided that majority of all boards of selectmen should be freemen.<sup>1</sup> This was a long step toward popular government, nor can it be doubted that the practice in town-meeting was much more liberal than the theory which appeared in the laws of the statute-book, so that it is not unlikely that the non-freemen often found expression for their choice, even in the election of colonial officers and in the determination of public policy.<sup>2</sup>

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<sup>1</sup> Records, Vol. II., p. 197. In Haverhill, 1685, it was found that the majority of the selectmen were not freemen as this law required, "and so without reflection or disrespect Daniel Bradley was left out, and Josiah Gage chosen in his room." (*Hist. of Haverhill*, p. 141.) For many examples of non-freemen's holding town offices and high appointments, see *History of Watertown*, p. 1016.

The fewness of the freemen in some of the towns reduced their influence to a very low point, and in the Records are noticed several petitions asking for relief. To these the General Court answered in accordance with the spirit of the time. Political influence was not to be secured by reducing the number who should be represented by a deputy, or by "gerrymandering" the colony in favor of the aggrieved section, but "In answer to their (*i. e.* the citizens of Scarborough and Falmouth) request for the augmentation of freemen, this Court declares that it is the best expedient to obtain the ends desired that those parts furnish themselves with an able, pious and orthodox minister, and commend that to them." (May 31, 1670, Records, Vol. IV., Pt. II., p. 452.)

<sup>2</sup> Mr. C. F. Adams' (*Genesis of the Massachusetts Town*, pp. 38-40) cites a number of instances from the Braintree Records which indicate great laxity in confining the voting of non-freemen within

Massachusetts had good cause for concern at news of the Restoration. To be sure she had not, like some of her sister colonies, formally acknowledged the Commonwealth, but the independent, self-aggrandizing policy which she had pursued could not fail to be distasteful to a jealous Stuart, even if it had not raised up a swarm of enemies of the Puritan colony who now importuned the King with complaints and petitions for relief.<sup>1</sup> In the summer of 1662 the special agents who had been sent to England to answer the attacks which were being made upon the colony, returned bringing a letter from the King.<sup>2</sup> So far as the charter was concerned this letter was reassuring, for it confirmed that instrument, and granted indemnity for offenses committed under the Commonwealth. For the Quakers the King no longer demanded tolerance, but he insisted that such as wished to use the Book of Common Prayer should be admitted to the sacraments. The wisdom, virtue and integrity of the candidates, he directed, should be the only considerations in the choice of Governor and assistants.<sup>3</sup> The most far-reaching demand was that "all freeholders of competent estates, not vicious in conversation, and orthodox in religion (though of different persuasions concerning church government) may have their votes in the election of all officers, both civil and military."

That the oath of allegiance be required and that justice be

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legal limits. Any one who has attended a Massachusetts town-meeting of the present day will acknowledge that in the primitive assemblies the voting of inhabitants was probably not subjected to very close scrutiny. The laxity which Mr. Adams describes is, however, so far as the writer's experience goes, not duplicated in the smaller towns. Hearing a vote challenged is not there uncommon. That a similar supervision was exercised in the early town-meetings is shown by non-freemen being sometimes fined for "having hand in the undewe election" of a deputy. Records, Vol. I., p. 221.

<sup>1</sup> Hutchinson Collection, pp. 324-30. Records, Vol. IV., Pt. I., pp. 450-4.

<sup>2</sup> Dated June 28, 1662. Records, Vol. IV., Pt. II., pp. 164-6.

<sup>3</sup> *Supra* p. 35.

administered in the King's name were the only demands in the royal letter which were not ignored.<sup>1</sup> Accordingly in the spring of 1664 a Royal Commission was sent over by the King to adjust controversies and inspect the administration of the colonial governments. In the other colonies the Commissioners met with ready obedience, but in Massachusetts their action was thwarted at every step. A few weeks after their arrival, however, the General Court thought it wise, in anticipation of attack, to comply in form with the King's requirement that the suffrage be open to dissenters. Declaring all laws excluding non-members from freedom to be now repealed, the Court proceeded to enact that in future, all Englishmen twenty-four years of age, who were householders and settled inhabitants of the jurisdiction, upon presenting a certificate signed by the minister of their town to the effect that they were "orthodox in religion and not vicious in their lives," and also a certificate signed by a majority of the selectmen of their town declaring that the applicants were freeholders and rateable "in a single country rate to the full value of ten shillings," *or*, that they were "in full communion with some church amongst us," might "from time to time present themselves and their desires to this Court for their admittance to the freedom of this Commonwealth and should be allowed the privilege to have their desire propounded and put to vote in the General Court for acceptance to the freedom of the body politic by the suffrage of the major part."<sup>2</sup> With a certificate required from a minister of the dominant church, and another from the selectmen, a majority of whom by colonial law must be freemen, together with a high property qualification for non-members from which communicants were entirely exempted, with all these restrictions before a candidate's name could be proposed for freedom, these shrewd legislators must have thought the defenses of their Puritan citadel were still reasonably well secured!

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<sup>1</sup> The administering of this oath was by charter optional. *Supra*, p. 8.

<sup>2</sup> Records, Vol. IV., Pt. II., pp. 117-18. See also *Ibid.*, p. 134.

The Commissioners were not slow in discovering that this law of 1664 was a mere evasion and far from meeting the King's requirement.<sup>1</sup> In their rejoinder to the General Court they say: "You have so tentered the King's qualifications as in making him only who payeth ten shillings to a single rate to be of competent estate that when the King shall be informed, as the truth is, that not one church-member in a hundred pays so much and that in a town of an hundred inhabitants scarce three such men are to be found, we fear the King will rather find himself deluded than satisfied with your late act."<sup>2</sup> "Yet if this rate were general, it would be just, but he that is a church-member, though he be a servant and pay not two pence, may be a freeman."<sup>3</sup>

The reply of the General Court to these well-founded complaints was characterized by artful dodging of the real points at issue. Every privilege attended with real profit they declared freely open to all without regard to their opinions or ecclesiastical practices; the law restricting to church-members the liberty of electing and being elected to offices had been repealed. That the law regulating the admission of freemen favored the bestowal of the franchise upon church-members having less estates than some that were not in church communion, they could not deny. But the rare advantages of "subjection to ecclesiastical authority,"—"the Lord accounting it among the choicest of all privileges that he bestows, and therefore may not be accounted a burden imposed by man,"—and of being freed from the burdens and responsibilities of offices, whose "retribution" did not make the holders objects of envy, were boldly put forward by the General Court as more than compensating the great majority of the men of Massachusetts for being under the control of

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<sup>1</sup> For the King's instructions to the Commissioners see *Ibid.*, p. 192.

<sup>2</sup> Records, Vol. IV., Pt. II., p. 205. Palfrey (Vol. III., p. 41, n. 3) estimates that in 1670 there were from 1200 to 1300 freemen in Mass., or about one freeman to every four or five adult males.

<sup>3</sup> Hutchinson Collection, p. 418.

a government in which they had no voice!<sup>1</sup> In the face of such stubborn resistance the Commissioners could accomplish nothing; their attempt to remove or greatly modify the religious test was a complete failure. Writing a dozen years later, Randolph declared that no person was "admitted to be a freeman of the colony or have vote in any election but church-members who are in full communion and approved by the General Court."<sup>2</sup>

In 1673 the barricade against dissenters was again strengthened. The two certificates from minister and selectmen seem to have proved ineffective in barring the admission of undesirable citizens, and it was now enacted that in future the names of candidates for admission to the franchise, "not being members of churches in full communion," should be propounded in some session of the General Court, but lie over until the next Court of Election before being put to vote.<sup>3</sup> The object of this act was doubtless not only to prevent hasty action, but also to secure upon each candidate the vote of the large numbers of freemen in addition to the assistants and deputies, who would then be present. A decade later, however, this law was repealed.<sup>4</sup>

A somewhat obscurely worded act of 1681 apparently broadened the franchise by admitting to full citizenship any town inhabitants who had proved their worth and ability by serving in local offices, such as those of constable, selectman or juror, to which they had been elected by their fellow-townsmen.<sup>5</sup>

The report of the Royal Commission gave little satisfaction to the King. Fortunately his attention was diverted, and for a number of years Massachusetts was suffered to

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<sup>1</sup> Records, Vol. IV., Pt. II., pp. 221-2.

<sup>2</sup> Hutchinson Collection, p. 477.

<sup>3</sup> Records, Vol. IV., Pt. II., p. 562.

<sup>4</sup> Records, Vol. V., p. 385, 1683.

<sup>5</sup> *Ibid.*, p. 307.

manage her own affairs. But Randolph was faithful in his odious duties as informer, and no overstepping of chartered powers did he fail to bring to the King's notice. As opposition to the colony was becoming ominous, in March, 1682, the General Court chose Dudley and Richards to act as agents for the colony. Among other things they were instructed to explain that in the matter of admission to the franchise the freemen of Massachusetts humbly conceived it was their liberty to choose whom they would admit into their own company; that this, however, had not been restrained to congregational men, but the admission of others in accordance with the King's letter had been provided for by the law of 1664, which had also repealed the restriction of freedom to church-members.<sup>1</sup> Two years later, further instructions were sent to the agents. Having repealed the law which required a year's probation after the candidate was propounded for freedom, the General Court now bade the agents make no alteration of the qualifications then required by law, "it being of the essentials in our charter to use our liberty with respect to freemen"; neither were they to consent to any change of the existing constitution of the General Court consisting of magistrates and deputies as the select representatives of the freemen; nor were they to yield to any infringement of their liberties in the matter of religion.<sup>2</sup>

This defense, however, proved unavailing. By a decree in chancery, June, 1684, the charter was cancelled and the colony became a royal possession. Death prevented the King's carrying out the plans he had formed for the government of his newly acquired province.<sup>3</sup> Upon the accession of James II. there was issued a proclamation bidding all officials throughout his dominions continue in the exercise of their duties until further orders should be received. On May 12, 1686, was held the last election nominally under the

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<sup>1</sup> Records, Vol. V., pp. 346-7.

<sup>2</sup> *Ibid.*, p. 390.

<sup>3</sup> Feb. 6, 1685.



provisions of the old charter. Within a week from that date, commissioners arrived for the inauguration of the new régime. The government, extending over Massachusetts, Maine, New Hampshire and the King's Province, was to consist of a President, Deputy President, and sixteen Councilors. No General Court was to share their control, for the King had expressly rejected the proposal of a "House of Assembly." The Council's functions were merely executive and judicial; to make laws or to collect taxes except such as had already been levied by law was beyond their power.<sup>1</sup> May 20, 1686, under protest, the General Court gave up the government into the hands of the newly constituted authorities, and for the time being representative government was at an end. Early in June, President Dudley and his Council sent reports to England of the peaceful change of government; they called attention to the difficulty arising from the fact that many of the Councilors appointed by the King had refused to serve, and declared that it would be "much for His Majesty's service, and needful for the support of the government and prosperity of all these plantations to allow a well regulated Assembly to represent the people in making needful laws and levies."<sup>2</sup>

The government of Dudley and his associates was looked on as merely temporary, for within a month after the inauguration of the new rule there had been appointed a General Governor whose coming was constantly expected. In December, Sir Edmund Andros landed in Boston, bearing commission as Governor over the provinces which had been under Dudley's jurisdiction, and over Plymouth, in addition. The tyranny of Andros need not delay us long. The years of his rule, it goes without saying, saw no representative government, no broadening of the suffrage. By the vacating of the charter, the framework of self-government, which through half a century the colonists had been painfully erecting upon that slight foundation, was utterly swept

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<sup>1</sup> Palfrey, Vol. III., p. 485.

<sup>2</sup> *Ibid.*, p. 495.

away. In place of their elective Governor and General Court of assistants and deputies of the people, there was rudely substituted an arbitrary Governor, commissioned by the King and ruling with the advice of a Council appointed and replenished by the Crown. Accustomed to exercising all the powers of self-government, "New England was asked to accept a system in which all taxation was modeled on ship-money, and all legislation on the exercise of the dispensing power."<sup>1</sup>

We are here concerned with only a few aspects of this short-lived tyranny. In May, 1686, the General Court, temporarily and under constraint, abdicated its power. As a protest against taxation without representation had heralded the birth of a representative Assembly, so now, half a century later, a sturdy resistance to the same act of oppression was to follow the death of the Assembly. In matters of legislation Andros moved slowly, but in the first act of his administration lay the germ of prolonged opposition. It provided that on warrant from the Treasurer, the constable of each town should summon a town-meeting for the election of a taxing commissioner, who should act with the selectmen in assessing upon the citizens the amount at which the town had been rated, the total amount of the tax being fixed by the Governor and Council.<sup>2</sup> In the summer of 1687 came the first order for the election of these commissioners. Not a few towns refused to choose any such officer. But it was Ipswich, perhaps at this time the second town in the colony in size and importance, that brought down upon herself the Governor's wrath by her outspoken protest against his arbitrary rule. In informal conference, some of the principal citizens decided that "it was not the town's duty any way to assist that ill method of raising money without a General Assembly." This opinion was vigorously presented in town-meeting the next day, and the town unanimously en-

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<sup>1</sup> Doyle, Vol. II., p. 305.

<sup>2</sup> Connecticut Records, Vol. III., pp. 405-11.

dorsed and adopted it. Not content with this, they forthwith transmitted to the Governor and Council an announcement of their refusal to elect a commissioner, or to allow the selectmen to lay any rate until it should have been voted by a General Assembly in concurrence with the Governor and Council; they justified their action on the ground that the recent act providing for the election of a commissioner "infringed their liberty as free English subjects of his majesty, by interfering with the statute laws of the land, by which it was enacted that no taxes should be levied upon the subjects without the consent of an assembly chosen by the freeholders, for assessing the same."<sup>1</sup> Here again, as in 1632, the spirit of Magna Charta awoke among the New England colonists; again, as at Watertown, half a century before, it was the minister, the Reverend John Wise, who led his people in their struggle to maintain their threatened liberties. Resistance was hopeless. Wise and five of the principal inhabitants of Ipswich were seized, brought to Boston, thrust into jail, being denied the right of *habeas corpus*, and were presently brought to trial before judges among whom sat Joseph Dudley and Edward Randolph, and before a jury largely made up of "non-freeholders, strangers and foreigners." Conviction was of course easy when such pains had been taken to ensure it. Back to prison they were taken and there confined for a number of weeks before sentence was finally given. They were all disqualified from holding office, and Mr. Wise was suspended from the ministry; each man was obliged to pay a heavy fine in addition to costs, and to give bonds for good behavior.

Such rigorous measures the colonists could not resist. They were forced to submit, and the arbitrary taxes were raised without much further difficulty. But this experience had shown Andros where only he might expect to meet with resistance, and he was not slow in acting upon his discovery.

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<sup>1</sup> History of Ipswich, Hamilton and Essex, pp. 123-5, containing quotations from "The Revolution in New England Justified." Palfrey, Vol. III., pp. 525-9.

In the town-meetings he saw the nurseries of revolt, and forthwith a law was enacted forbidding that more than one town-meeting be held in a year, "upon any pretense or color whatsoever."<sup>1</sup>

News of the landing of the Prince of Orange in England had hardly reached Boston when a sudden uprising of the people seized the government and placed Andros and Dudley in jail. The leaders in this uprising formed themselves into a "Council for the Safety of the People and Conservation of the Peace." At their call, May 9, there met a convention made up of delegates, two from each town and four from Boston. This assembly was in favor of reviving the charter, and called upon the assistants, who had abdicated when Dudley assumed power, to resume their office, and with the delegates to constitute a General Court. To the assistants this seemed too bold a step. Another convention was called, and delegates appeared with definite instructions from their constituents. Of the fifty-four towns here represented, forty favored the revival of the charter, and the Governor and magistrates chosen in election of 1686 now consented to resume office. Thus when the order to proclaim King William and Queen Mary was received in Boston, the colonial government was running smoothly in the old charter ruts.<sup>2</sup>

In Plymouth the example of Massachusetts was followed. June 1 a General Court was held, and the government was organized in much the same form and with nearly the same officers as in 1686. Similar proceedings took place in Rhode Island and Connecticut, and "Again Englishmen were free and self-governed in the settlements of New England."<sup>3</sup>

For six months this government which the colonists had thus resurrected guided the affairs of Massachusetts before the colony was again brought into relation with the home government. In December there came to the octogenarian

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<sup>1</sup> March, 1688. Connecticut Records, Vol. III., p. 440.

<sup>2</sup> Records, Vol. VI., p. 50.

<sup>3</sup> Palfrey, Vol. III., p. 598.

Governor a letter from the King authorizing the persons in office to continue the administration of the government until the receipt of further instructions. This was interpreted as authorizing the renewal of the old charter form of government, and during the next two years courts and elections were regularly held.

The government was recognized by all as purely provisional. Its acts might be reversed, and the government itself abolished whenever the King should have leisure to turn his attention to his colonies. It was a period of the greatest uncertainty. Meantime the agents of the colony in England were leaving nothing undone to secure the renewal of the charter. The King, the Queen, nobles and leaders in Parliament were importuned in behalf of the colony's lost liberties. In their anxiety to secure their old patent, the General Court, in February, 1690, anticipating any demand for religious toleration, granted modifications in the law respecting the admission of freemen which for three score years they had rigorously withstood. Not only was the property qualification reduced, but in place of a testimonial from the town minister to the candidate's religious character and orthodoxy, there was now accepted as sufficient a mere certificate from the selectmen to the effect that the man was "not vicious in life."<sup>1</sup>

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<sup>1</sup> Mass. Coll. Rec., *sub die*. Palfrey, Vol. IV., p. 26.

## CHAPTER V.

### REPRESENTATION AND SUFFRAGE IN THE PLYMOUTH COLONY. 1620-1691.

The Plymouth colony never secured a charter. In the preamble to the book of laws it was declared that the enactments which were to follow were made by virtue of "a solemn and binding Combination, and also Letters Patent derivatory from His Majesty of England, our dread Sovereign, for the ordering of a body politic within the several limits of this Patent."<sup>1</sup>

Forced to plant the colony beyond the jurisdiction of the Virginia Company, from which body they held a patent, the Pilgrims found themselves cut loose from all established civil authority. Their patent gave them no rights or powers in New England, and they held no grant from the Crown. Their church organization could not serve as the basis for the civil government, for there were uncongenial "strangers" among them who owned no allegiance to the ecclesiastical authorities, and who were already boasting that as soon as they landed "they would use their own liberty, for none had power to command them."<sup>2</sup> It was under these circumstances that the Pilgrims drew up and signed the famous Mayflower Compact. This "solemne Combinacon," the first of the two constitutional documents upon which the Plymouth government rested, was primarily "a general acknowledgment of the authority of the whole community over each of its individual members."<sup>3</sup>

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<sup>1</sup> 1636. Plymouth Colony Records, Vol. XI., p. 6.

<sup>2</sup> Bradford, *History of the Plymouth Plantation*, p. 89. The Compact is given in the same connection.

<sup>3</sup> Doyle, *The Puritan Colonies*, Vol. I., p. 62.

As a first step toward the organization of government under this simple constitution, Mr. John Carver was chosen, "or rather, confirmed," their Governor for that year. No other officers were elected for some time, nor were the Governor's powers in any way defined, they "confiding in his prudence that he would not adventure upon any matter of moment without consent of the rest, or, at least, of such as were known to be wisest among them."<sup>2</sup> Legal standing was given to the new colony by the action of the London partners, in securing a patent from the Council for New England.<sup>3</sup> But not until after the dissolution of the partnership with these London capitalists were the colonists able to secure a patent directly from the Council for New England, granting to men resident in the colony powers of legislation, subject, however, to the usual condition that nothing should be enacted contrary to the laws of England, and limited also in favor of any form of government which the Council might choose to establish.<sup>4</sup> Attempts to secure a royal charter proved unavailing. The Plymouth settlers' only guarantee of legislative independence lay in the uncertain favor of the Crown, and in the forbearance of a commercial company that had little sympathy with their aims. Till the time of the final union with the colony of Massachusetts Bay, the Mayflower Compact and this patent of 1630 formed the constitutional foundation upon which the Plymouth government rested.

The first change in the form of the executive seems to have been made as a matter not of principle but of accommodation to peculiar circumstances. Early in the spring of 1621 Governor Carver died. In his place was chosen William Bradford, and "he being not yet recovered of his ill-

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<sup>1</sup> Bradford, p. 68. Carver was probably the Governor of the Mayflower, chosen in Southampton, "to order the people by the way."

<sup>2</sup> See Hutchinson, Vol. II., p. 457.

<sup>3</sup> May, 1621.

<sup>4</sup> Jan., 1630.

ness, in which he had been nigh the point of death, Isaac Allerton was chosen to be an assistant unto him."<sup>1</sup> Although elected simply because Bradford would otherwise have been "unable to bear the whole burden,"<sup>2</sup> this choice of an assistant served as a precedent. The same Governor and assistant were chosen yearly until 1624, when, the numbers having increased, and the administration of affairs having become more complicated, Governor Bradford, at the annual election, urged the voters "to change the persons as well as renew the elections; and to add more assistants to the Governor for help and counsel, and the better carrying on of affairs," arguing that if office-holding were an honor, then more should be made partakers of it, while if, as he thought, it were a burden, more should help bear it. Accordingly, instead of a single assistant, five were chosen, the Governor being given "a duple voyce."<sup>3</sup> A few years later, the number of assistants was raised to seven.<sup>4</sup>

For nearly twenty years the simple constitutional machinery of Plymouth underwent little change. Executive and ordinary judicial power were in the hands of the Court, or Bench, consisting of the Governor and seven assistants, elected annually by the whole assembly of freemen. The real law-making was done in primary assembly, in which only freemen were allowed to vote. This folkmoot was also the supreme judicial body.

That the primitive market democracy sufficed in Plymouth for nearly a score of years was a corollary of the slow growth of the settlement.<sup>5</sup> With the rise of new townships<sup>6</sup> came the necessity for some system of government by delegated authority; but the development of the representative body

<sup>1</sup> Bradford, p. 101.

<sup>2</sup> Hutchinson, II., 65.

<sup>3</sup> Bradford, p. 156.

<sup>4</sup> 1633. Hutch., Vol. II., p. 465.

<sup>5</sup> In 1624 there were but 180 inhabitants, Smith's "Gen. Hist.," p. 247. In 1626 this number had not doubled. See patent of 1629, in Hazard, Vol. I., p. 300.

<sup>6</sup> Duxbury and Scituate. Plymouth town, first distinguished from the colony, Oct. 28, 1633. Ply. Town Rec., Introd., p. x.



was very gradual. The idea of representation in politics was made familiar to the settlers by the example of Massachusetts, and also by a favorable experience of its workings in another field. At the General Court held in October, 1636, it was ordered that four delegates for the town of Plymouth, and two each for Duxbury and Scituate, should be added to the Governor and assistants, as "Comittees for the whole body of this Comonweale," to revise and codify the colonial laws.<sup>1</sup> By this representative commission the existing division of powers between the magistrates and the General Court was confirmed, and there was formulated a code of laws which gave satisfaction for many years.<sup>2</sup> But although attendance at the General Assembly was becoming very difficult<sup>3</sup> for the scattered settlers, and although this favorable experience with the work of delegates was fresh in their minds, the men of Plymouth were not such innovators as to institute straightway a full-fledged system of representative government. They went about it piece-meal. While the deputies were revising and compiling the laws, important changes were being made in the organization of the General Courts. The first Tuesday in June was set apart as the day upon which should occur the annual election<sup>4</sup> of colonial officers. Fair warning was to be given the freemen by the constable, "either to make their personall apearance att the Courts of Election or to send their voates by proxy for the choice of officers."<sup>5</sup> The legislative Assemblies, however,

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<sup>1</sup> Rec., Vol. XI., p. 6.

<sup>2</sup> One of the most interesting of these laws, in the present connection, was that which required that the laws and ordinances for the government of the colony "be made onely by freemen of the Corporacon & no other." Rec., Vol. XI., p. 11.

<sup>3</sup> Evidenced by the necessity of imposing a fine, 3s., for non-appearance at the annual election, or for leaving the Court without permission before its dismissal. Rec., Vol. XI., pp. 10, 13.

<sup>4</sup> Records, Vol. XI., p. 10, and p. 80.

<sup>5</sup> As later developed, proxy voting took this form: in each town the deputies gave notice in the same town-meeting in which they were chosen, that those freemen who did not mean to attend the

all the freemen were still expected to attend. That some form of delegated government was a necessity is shown from the fact that in 1638 sixteen freemen were fined for absence from the Assembly.<sup>1</sup>

In Massachusetts, as has been seen, the General Court had already become a truly representative body, yet the change had appeared of so little importance that the process by which it was accomplished finds no mention in contemporary records.<sup>2</sup> In Plymouth, however, the last step toward a complete representative system was definitely and consciously taken in the law of March, 1638, which enacted: "That every town shall make choice of two of their freemen and the town of Plymouth of four to be Committees, or Deputies, to join with the Bench to enact and make all such ordinances as shall be judged to be good and wholesome for the whole."<sup>3</sup> The laws made by this representative legislature, however, in case they should "prove prejudicial to the whole," might be repealed by the freemen at the next Court of Election. Thus for a time the folkmoot continued to be in theory the supreme legislative body, but in practice law-making was soon in the hands of the representative Assembly, composed of Governor, assistants and deputies.<sup>4</sup> This

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General Court of Election in person might then "giue in theire voates Sealed vp for the chosing of Gou'r Assistants Commissioners and Treasurer." These secret ballots, or "proxies," were immediately sealed up in a parcel together. 1641, Records, Vol. XI., p. 81. In the Court of Election the order of procedure was that "the voates of all the ffreemen present bee first read and Next after them the deputies of the seuerall townes shall orderly present the proxy of theire owne towne." 1658, Records, Vol. XI., p. 81.

<sup>1</sup> Records, Vol. I., p. 104.

<sup>2</sup> 1634. *Supra*, pp. 21 and 22.

<sup>3</sup> Records, Vol. XI., p. 31. At the time of the passing of this law there were but three towns; before the next General Court, four more had been incorporated. Baylies, p. 298.

<sup>4</sup> In 1646, Records, Vol. XI., p. 54, on complaint of the deputies at the burden of attending three courts in a year, it was ordered that the whole body of freemen should appear yearly in the June court, to make and repeal necessary laws. They should at that time present the deputies whom they had chosen, and these

smaller body received formal recognition as the regular legislative Assembly in the act passed in September, 1658, intended to summarize and interpret previous laws upon this matter. It provided "that fit and able persons be annually chosen out of the freemen to attend June Courts and the several adjournments thereof, by the approved inhabitants qualified as in such case is provided of this Jurisdiction, in their respective townships, for deputies, unto whom with the magistrates, as the body Representative, is committed full power for the making and repealing of all laws as upon their serious considerations they shall find meet for the public weal of this Jurisdiction, and that then only such laws be enacted or repealed, except the Governor for the time being shall see weighty and necessary cause, by the complaint of the freemen or otherwise, to call a special Court, either of the whole body of the freemen or their deputies."<sup>1</sup> By this law there was given to the representative machinery of Plymouth definite form which was not materially altered during the subsequent history of the colony. The changes which did take place were in the basis of representation. To understand them it will be necessary to trace the development of the two ranks of citizens, inhabitants and freemen.

Who, then, were the "approved inhabitants, qualified as in such case is provided of this Jurisdiction"? It might be thought that the hardships of life at Plymouth and the aus-

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should attend the adjournments of this June court, to which all law-making was to be confined. The other two courts being reserved for matters of judicature only, the deputies were not required to attend them. The transition from a primary to a representative assembly was not complete for a number of years; meantime, the two were combined by various compromises. In 1657 (June 3, Records, Vol. III., p. 165) "the whole body of the freemen personally appeared and enacted sundry laws." Two years later (Records, Vol. III., p. 174) the question having been submitted to the towns whether all the freemen should be summoned to the next June court, sixty-three votes were recorded in favor of, and one hundred and eleven against such a summons.

<sup>1</sup> Records, Vol. XI., p. 155.

terity of the Pilgrims' manners would have been a sufficient protection to them against the coming of uncongenial neighbors. But it must be remembered that the Pilgrims had been obliged to make unto themselves friends of the mammon of unrighteousness in the persons of certain London capitalists and adventurers whose motives were far different from those of the Leyden congregation. Even in the Mayflower the Pilgrim found lawless companions. Having left Holland principally to escape influences which they judged corrupting to themselves and to their children, it was but natural that, as domination from their London partners ceased, the Plymouth settlers should take measures to secure against corruption by strangers that manner of life and those forms of government which they had braved the ocean and tamed the wilderness to gain for their posterity.<sup>1</sup>

Among the earliest laws was one providing that "no person or persons hereafter shall be admitted to live and inhabit within the government of New Plymouth without the leave and liking of the Governor or two of the assistants at least."<sup>2</sup> Where especial caution seemed necessary, the central authority did not hesitate, in exercising that far-reaching superintendence so much more prominent in Plymouth than in the other colonies, to step in and prescribe special conditions

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<sup>1</sup> Bradford, pp. 22-4. An amusing instance of Pilgrim exclusiveness is given in Bradford, pp. 217-21. "They packed him away and those that belonged unto him by the first opportunity, and dismissed all the rest as soon as could, being many untoward people amongst them."

<sup>2</sup> Mar. 7, 1636. Records, Vol. XI., p. 26. Perhaps of still earlier date is the provision, Records, Vol. XI., p. 17, that none should be allowed to be house-keepers, or to build any house, until allowed by the Governor or some assistant.

In 1638, in its commission to those who were about to found a new town, the General Court conferred upon them two powers: they were enabled to dispose of the lands within their limits, and they were required to be "conscionably faythfull, & carefull to receive in peacable & faythfull people according to their best discerneing," etc. Ply. Rec., Vol. I., p. 113.

of approval by the church.<sup>1</sup> In 1642, a quiet and unchallenged residence of three months within a township was made to constitute a man an inhabitant of that place.<sup>2</sup> Two years later, however, this law was declared to be applicable only to "poor persons," and no mere length of residence was to constitute a man an inhabitant who should refuse to take the Oath of Fidelity.<sup>3</sup> But as a result of a few years' experience of even this degree of laxity it was found that many persons "are crept into some townships of this Jurisdiction which are and may be a great disturbance of our more peaceable proceedings."<sup>4</sup> It was therefore thought best to reenact "that ancient and wholesome order" which required the approval of the Governor or two of the assistants. Any who would not approve themselves so as to procure this

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<sup>1</sup>The town of Sandwich seems to have been especially troublesome, so that (Oct. 3, 1639) the General Court, "for the redress of the negligence of the committees in receiving into the town many inhabitants that are not fit for church society, and for the preventing of like evil for ensuing time," ordered that in future none should be admitted as inhabitants to that town without the consent and approbation of the pastor and of the church first had and obtained, and forbade the sale of land to any except such as were generally approved by the whole town. Records, Vol. I., p. 134. Twenty years later (Oct. 2, 1658) unruly Sandwich again required attention. The provisions of the previous order had not been carried out, and the court now disqualified several men by name, because of non-legal admittance as inhabitants, from acting in any town meeting, or claiming "title or interest into any town privileges as towns men." This was to apply to all others whose admittance had not been legal. Again the approval of the church together with that of the Governor or one of the assistants was insisted upon as a pre-requisite to the granting of freedom. Records, Vol. III., p. 153.

By a law passed in Mar. 1642, any one who, "without consent and assent of the Townesmen in lawfull generall publike meeting," should bring into town persons who were liable to become a charge to the town, was made responsible for them. Records, Vol. XI., p. 40.

<sup>2</sup>Records, Vol. XI., p. 40.

<sup>3</sup>Aug. 22, 1644. Records, Vol. XI., p. 44. The Oath of Fidelity is printed in Records, Vol. XI., p. 9.

<sup>4</sup>1658. Records, Vol. XI., p. 118.

were to be warned to depart the colony, or be dealt with according to the discretion of the court. Nor did time seem to relax this exclusiveness toward strangers of doubtful opinions. As late as 1675 we find it enacted, "for the preventing of profaneness increasing in the colony which is so provoking to God, and threatening to bring judgments upon us," that persons who should "at any time intrude themselves to inhabit any where within this colony" without obtaining leave, should be warned out of the colony, and fined five shillings a week if they did not speedily heed the warning, "hoping the Court wilbe carefull; that whom they accept off; are persons orthodox in their Judgments."<sup>1</sup>

Before the beginnings of representation in Plymouth, apparently only freemen were allowed to attend the Assembly or have any voice in the government. But as new towns sprang up, regularly qualified inhabitants had an equal vote with freemen in purely local affairs and were occasionally chosen to fill minor town offices.<sup>2</sup> The first broadening of this suffrage seems to have taken place in 1638, when the representative Assembly was instituted. Even then only freemen could vote in the election of Governor and assistants; but in the choice of deputies, since the charges were to be borne by freemen and non-freemen alike, the privilege of voting was given to "such as were not freemen but had taken the Oath of Fidelity and were masters of families and inhabitants of said towns provided they chose them only of

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<sup>1</sup> Records, Vol. XI., p. 248 and p. 57. For an interesting discussion as to who were the inhabitants or "Townsmen" of Plymouth town, see Plymouth Town Records, pp. 90, 107-8, 138.

<sup>2</sup> Records, Vol. XI., p. 143, 1665. In each town three or five Selectmen were to be chosen by the *townsmen* out of the *freemen*. The town of Plymouth had its selectmen since 1649. (Town Records, pp. 29-30.) Men chosen to this office who refused to serve were fined 20s., one half to the town, the other to the use of the colony, and the Governor appointed a man to fill the vacancy. 1670, Records, Vol. XI., p. 227. After 1681, selectmen of the various towns took their oath of office in the General Court. Records, Vol. XI., p. 252.

the freemen of the said town whereof they were."<sup>1</sup> This vote of equal value with that of the freemen in the election of deputies gave the inhabitants no small influence over legislation. In many towns the number of inhabitants was doubtless greater than that of the freemen, so that, in case of any difference of interest, the deputy chosen, though himself a freeman, would be one who would voice the sentiments of the inhabitants.<sup>1</sup> In 1669 the franchise was narrowed by imposing a property qualification upon inhabitants; "none should vote in town meetings but freemen or freeholders of twenty pound ratable estate and of good conversation having taken the oath of fidelity."<sup>2</sup> A few years later the final step was taken; "as some do abuse their liberty," it was ordered that voting in town-meetings be confined to freemen.<sup>3</sup>

In the "Pilgrim Republic," as in the other colonies, "the freemen were the fountain of power."<sup>4</sup> To be sure, the in-

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<sup>1</sup> Records, Vol. XI., p. 31.

<sup>2</sup> This was probably the difficulty which it was sought to obviate, twenty years later. (1658, Records., Vol. XI., p. 169.) Observing that "by weakness, prejudice or otherwise it hath or may come to pass that very unfit and unworthy persons may be chosen, that cannot answer the Court's trust in such a place," each Court, upon assembling, was ordered "in the first place to take notice of their members," and if any unfit for such a trust should be found, "that they and the reason thereof be returned to the town from whence they were sent, that they may make choice of more fit and able persons to send in their stead as the time will permit." In 1667 there was passed an act permitting the town of Sandwich, "in regard of their scarcitie of men fit for publicke employment," to send but one deputy to the General Courts. Records, Vol. IV., p. 157.

<sup>3</sup> July, 1669. Records, Vol. XI., p. 223. Baylies misquotes this statute and makes the property qualification apply to freemen as well as to others. The proper reading of the law, and consistency with other Plymouth legislation as well as with Massachusetts precedent (Records of Mass., Vol. IV., Pt. II., pp. 117-8) would seem to limit the requirement of a property qualification to freeholders. G. W. Chase (Hist. of Haverhill, p. 115) discusses the distinction between "freeholders" and "freemen."

<sup>4</sup> 1671, according to J. A. Goodwin, *The Pilgrim Republic*, p. 405. The writer has looked in vain for the original authority for this statement.

habitants might vote in town-meetings on local affairs; might, as in Connecticut, take part in the election of deputies to the General Court, and might share in nominating assistants.<sup>1</sup> None but freemen, however, could vote in the choice of colonial officers, and only from the ranks of the freemen could Governor, assistants and deputies be chosen, and consequently freemen alone (though, in the case of deputies, representing freemen and inhabitants alike) made and administered the laws.

The original freemen, or "those who were free of the Corporation," were the partners who, with the financial backing of London capitalists, came to America to found their little community of Independents. The great majority of them were members of the old Leyden congregation. But not all the men in the cabin of the Mayflower, nor yet all the signers of the Compact, were freemen; of that number, two were servants.<sup>2</sup> The annual Court of Election was the regular place where candidates were admitted to their freedom by vote of those who already possessed a freeman's privileges and interest in the government. Each candidate had to take the freeman's oath, which, unlike that of Massachusetts, pledged loyalty to the king and government of England, as well as to the colonial government.<sup>3</sup> In 1656 a further safeguard was placed upon the admission of freemen by the requirement that the name of each candidate for freedom should be propounded in the General Court by the deputy from his

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<sup>1</sup> But though each town might send up to the Court of Elections the name of one person who was judged meet to be an assistant, in the election of these magistrates, "the cuntrey" was not restricted to the list of candidates thus made up. June, 1651. Records, Vol. XI., p. 58.

<sup>2</sup> It has been inferred that all able-bodied male passengers upon the Mayflower were invited, or, perhaps, compelled, to sign this document. Mourt's "Relation," edited by H. M. Dexter, p. 7, note. Mr. J. A. Goodwin, however, shows reasons for thinking that the word "servant" was here used with a very extended meaning, equivalent to "secretary," or "general man-of-affairs." The Pilgrim Republic, p. 59.

<sup>3</sup> The freeman's oath is given, Records, Vol. XI., p. 8.



town; no name was to be presented unless it had already secured the approval of a majority of the freemen there resident.<sup>1</sup> Two years later there is seen a sudden change in policy, due, without doubt, to fear that the much-dreaded Quakers, who had just begun their witness-bearing career in New England, might in some way insinuate their hated views into the government. It was enacted that all candidates for admission as freemen should stand for one whole year and then be admitted if the court should see no cause to the contrary.<sup>2</sup> No mention of any relaxation of these restrictions is to be found in the colonial records. Nearly twenty years later a further precaution was taken in insisting that the approval of a candidate's name "be signified to the Court under the town clerk's hand."<sup>3</sup>

No small credit is due the Pilgrim colony for the fact that church-membership was not there, as in Massachusetts and New Haven, specially insisted upon as an essential qualification for citizenship.<sup>4</sup> But this is not equivalent to saying that in practice candidates for freedom of the colony had to stand no religious test. Though Puritan and Baptist, Episcopalian and Presbyterian were welcome in Plymouth, church attendance was compulsory under penalty of a fine, or public whipping,<sup>5</sup> and attendance at churches or meeting places not approved by the government was punishable by suspension

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<sup>1</sup> Records, Vol. XI., p. 65. The next year, 1657, this law was interpreted as meaning that the candidate should be admitted at the same court in which this testimony was given. Records, Vol. XI., p. 68.

Though mainly exclusive in its action, it is quite possible that favored inhabitants in exceptionally liberal towns may have secured freedom, who, but for this recommendation of their "free" neighbors, could not have gained the franchise. Thus in 1665 Rehoboth voted to confer citizenship upon "Sam, the Indian that keeps the cows,"—"the only case recorded in the colony of extending freemanship to one of that race." *The Pilgrim Republic*, p. 514.

<sup>2</sup> 1658. Records, Vol. XI., p. 79.

<sup>3</sup> *Ibid.*, p. 236.

<sup>4</sup> The writer finds no authority whatever for Mr. Deane's statement, *Hist. of Scituate*, p. 97.

<sup>5</sup> Records, Vol. XI., p. 58.

from having any voice in town-meeting and further penalties at the discretion of the court.<sup>1</sup>

It should be remembered that even for admission to the very incomplete citizenship enjoyed by inhabitants, by one of her later acts, Plymouth charged the court to be careful "that such as were admitted be persons orthodox in their judgments,"<sup>2</sup> and that in special cases she had not hesitated to demand approval by church and pastor as a pre-requisite to admission as an inhabitant.<sup>3</sup> When the austere and exclusive character of the first freemen is considered, and that, before admission to that rank, the candidate must be approved by the majority of his "free" neighbors who were sure to regard church-membership as the natural concomitant of the character they deemed requisite in a citizen, it may well be doubted whether a man holding views of questionable orthodoxy would have secured citizenship. The year 1658 was memorable for the passing of a series of statutes most of which are plainly to be associated with the recent advent of the Quakers. All who should refuse to take the oath of fidelity, and "such as were manifest encouragers of such," were to be given "noe voyce" in the election of public officers, and were to be excluded from any and all positions of public trust. No "Quaker Rantor or any such corrupt person," and none that were "opposers of the good and wholesome laws of this colony, or manifest opposers of the true worship of God, or that refused to do the country service," were to be admitted to freedom.<sup>4</sup> It was not enough to provide for the future; the ranks of those who were already freemen had to be purged; all were to lose their freedom who were Quakers or manifest encouragers of them,

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<sup>1</sup> Records, Vol. XI., p. 57.

<sup>2</sup> See *supra*, p. 74.

<sup>3</sup> In the admission of inhabitants and freemen the clergy must often have exercised the power of censors. But the uniting of civil and ecclesiastical authority in one person seems to have been avoided. A singular instance appears in the records where an assistant, "having been chosen deacon in the church, was at the request of the church and himself, freed from the office of an assistant in the commonweale."

<sup>4</sup> Records, Vol. XI., p. 177.

and "such as shall speake contemptuously of the Court & of the lawes therof, and such as are judged by the Court grosly Scandalous, as lyers drunkards swearers &c."<sup>1</sup>

Notwithstanding the absence of the formal religious test in Plymouth, the ratio of voters was greater by one-half in Massachusetts than in the older colony.<sup>2</sup> But for this, Pilgrim exclusiveness was not the only cause. In Massachusetts, political feeling ran high; even Winthrop was more than once squarely defeated. But in Plymouth partisanship and class feeling played no important rôle in politics; no disputed election of a Governor appears in the records. The increased privileges of full citizenship were accompanied by increased duties and burdens. A freeman must appear promptly at the Court of Election, either in person or by proxy, and remain there until dismissed.<sup>3</sup> If chosen selectman, he must serve.<sup>4</sup> If elected deputy, he must attend court promptly and regularly.<sup>5</sup> To the many who were then, as at the present day, indifferent to matters of government, the irksomeness of the duties required under the compulsion of a fine must have had more weight than the attractiveness of sharing directly in the government.<sup>6</sup>

In the sources of Plymouth history there is singularly little concerning the method of elections. In the code of 1636 it

<sup>1</sup> *Ibid.* Interesting instances of disfranchisement under this act, both of Quakers and their abettors, and also of men "grosly Scandalous," are cited, Records, Vol. III., pp. 167 and 176. 1656, William Nicarson was "disfranchised his freedom" for selling a boat to the Indians, contrary to a Court warrant; Records, Vol. III., p. 101. Captain Cudworth (1663, Records, Vol. III., p. 189) was disfranchised, "being found a manifest opposer of the laws of the government as appears by sundry expressions in a letter directed by him to the Governor, & otherwise."

<sup>2</sup> J. A. Goodwin, "The Pilgrim Republic," p. 415.

<sup>3</sup> Or be fined 3s. (Records, Vol. XI., pp. 10 and 13), 10s. (Records, Vol. XI., p. 84).

<sup>4</sup> Penalty of refusal, 20s. (Records, Vol. XI., p. 227).

<sup>5</sup> Penalty, 20s. (Records, Vol. XI., pp. 54 and 227.) Refusal to serve as Assistant or Governor met with a fine of £10 and £20, respectively. (Records, Vol. XI., p. 10, pp. 51, 212, 218.)

<sup>6</sup> *Supra*, p. 51. The remuneration of assistants and deputies was very small, so that this in itself could not have offered much at-

was declared that the election of Governor and assistants should be made "only by freemen, according to former custom."<sup>1</sup> Later it is incidentally mentioned that the election of assistants was by ballot.<sup>2</sup>

One striking difference in the organization of representative government in Massachusetts and in Plymouth was that the Plymouth legislature conducted all its business as a single body, never splitting into separate houses of assistants and deputies.<sup>3</sup> The Governor presided, and decisions were by a majority vote of the whole body. This uni-cameral General Court was never so large as to become unwieldy, and no serious difficulty seems to have been encountered

traction. £10 and table charges were the salary of an assistant. (1665, Records, Vol. XI., p. 212, repealed July 5, 1667. See also p. 219, where £50 is appropriated for the whole board of assistants.) In the first of these statutes only the re-elected assistants were to receive pay, the others having their table charges only, and taking the rest of their compensation in honor. The charges of the deputies were borne by the towns sending them, and may have varied, though a note in the margin of the record opposite the clause placing the charge upon the towns reads "2s. 6d. a day." (Records, Vol. XI., p. 91, 1638.) In Bradford's time the Governor usually received no salary. (Goodwin, p. 455, note.) In later years, small salaries, sometimes reaching £40 and £50, were granted. Records, Vol. XI., pp. 33 and 212.

<sup>1</sup> Records, Vol. XI., p. 7.

<sup>2</sup> Mar. 5, 1643. Records, Vol. XI., p. 42. A law providing for the election of assessors ordered that in every town three or four men be chosen "by writing their names in papers (as the magistrates are chosen.)" See also Records, Vol. XI., p. 157, where the votes of all the freemen present at the Court of Election were to be read before the proxies. The most recent view of the origin and history of the written ballot may be found in Campbell, Vol. I., p. 50, Vol. II., pp. 430-6. The written ballot had already been used in the Salem church election of a minister in 1629, and in Massachusetts elections of Governor and Deputies since 1634. *Supra*, p. 21, note 2, and p. 29. The exact date of its introduction into Plymouth it is impossible to determine. There was less need of it here because of the quietness of Plymouth politics, but it is quite probable that it was in use in Plymouth as early as in Massachusetts, and even earlier, if the view be correct that New England colonists obtained their knowledge of the use of the ballot from the Dutch.

<sup>3</sup> *Supra*, p. 44.

from the constitution of the Assembly.<sup>1</sup> There is no record of any violent controversy between the assistants and deputies, for the reason that they did not, as was the tendency in Massachusetts, represent respectively a "gentry" and a "generality." In 1650 there was some agitation in favor of dividing the house, but it came to nothing.<sup>2</sup> Another respect in which the General Court of Plymouth differed from those of Massachusetts and Connecticut was the far-reaching control which this central representative body exercised over the minor divisions of the colony. By law of 1658 it was provided that at the General Court of Election, constables, grand-jurymen and highway surveyors should present themselves for confirmation, if approved by the court;<sup>3</sup> while by a later law the choice of selectmen was to be under warrant from the General Court, sent down to the several towns, and at the Court of Election the selectmen thus chosen were to be sworn into office.<sup>4</sup>

During the period from 1686 to 1689 Plymouth was united with the other New England colonies under the arbitrary rule of Andros. Self-government was for the time suspended, being replaced by the rule of the Council. After the fall of this hated régime, the colonies, which had been forced into union against their will, straightway resumed their self-government, independent of one another. Conscious of the uncertain tenure upon which she held her self-rule, Plymouth made strenuous but unavailing efforts to obtain an independent charter from the Crown. In 1691 Plymouth was united to Massachusetts, and from that time the constitutional development of the "Old Colony" was merged in that of her more prosperous and aggressive neighbor.

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<sup>1</sup> To the last General Court of Plymouth, June 2, 1692, were sent 27 deputies, four towns sending none; six assistants were present.

<sup>2</sup> Records, Vol. XI., p. 57. The question of separation had been discussed at the preceding court. It was now decided that "magistrates and committees or deputies be considered together as one body."

<sup>3</sup> Records, Vol. XI., p. 157.

<sup>4</sup> *Ibid.*, p. 252, 1680

## CHAPTER VI.

### CHANGES INTRODUCED BY THE CHARTER OF 1691.

Opposition to French aggression was the key-note of King William's colonial policy. To make this effectual in America, the colonies must be consolidated and brought into vital connection with the English government. They must be welded into a weapon, to be used as the Crown should determine; yet this must be so done as not to arouse the antagonism of the colonists, else the edge of this weapon would be dulled. This motive may be read between the lines of the charter of 1691.<sup>1</sup> By this instrument was erected the "Province of Massachusetts Bay," which incorporated with Massachusetts not only her old Maine dependency but also the colony of New Plymouth.

The form of government was not much changed. It was to consist of a Governor, Council, and a House of Representatives elected by the freemen of the towns. But these names had not their old meanings. The Governor, Lieutenant-Governor, and Secretary were no longer elected by the people, but appointed by the King, and these officers, in turn, appointed the judiciary. To the Governor, the King's deputy, was given a veto upon all acts of the General Court, and any act, though approved by the Governor, might at any time within three years of its passage be set aside by the Crown. The Council, corresponding to the old board of assistants, was to consist of twenty-eight members, seven constituting a quorum. Those for the first year were nominated by the King, but thereafter they were annually elected by the General Court, subject to the Governor's negative.

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<sup>1</sup> The charter is printed in *Provincial Laws of Mass.*, Vol. I.

They were not necessarily freeholders. Something of district representation was secured to the body by establishing the minimum number of members that should be chosen from each section of the province: eighteen from Massachusetts, four from Plymouth, three from Maine, and one from the newly acquired Acadia. The House of Representatives was elected annually by the freemen of the towns; its members were required to be freeholders. Each town sent two representatives to the first General Court, and there the apportionment for the future was determined. To the representatives of the freemen was given the entire power of the purse, and by this act was apparently excluded arbitrary taxation by the Governor.

Not only was the machinery of government remodeled, but also radical changes were made in the basis of citizenship. To all except Papists entire liberty of conscience was given, and from this it followed as a corollary that the religious test which for three score years had kept three-fourths of the male adults from the ballot-box was entirely swept away. To men of Endicott's type this must have seemed like undermining the very foundations of government. But thoughtful men who were in the least emancipated from narrow Puritan prejudice must have seen in this, "the peaceful removal of a system which the community had outgrown. In the past it might have been a necessity; in the future it could be only a source of disunion and danger."<sup>1</sup> To the thousands who by this act were enfranchised it came as a long-deferred act of justice. In place of the odious religious test was substituted a simple and uniform property qualification; a freehold estate worth £2 a year, or £40 in personality brought with it the franchise.

The new charter was well calculated to carry out the King's policy. Dependence upon the Crown was ensured by the King's retaining the appointment of the highest officers and a veto upon all the legislative acts of the General Court. On

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<sup>1</sup> Doyle, Vol. II., p. 375.

the other hand, if the liberties of the colonists were curtailed, those that remained were more firmly grounded than under the old charter. Definite statement replaced construction and implication as the basis upon which their claims rested. Except that the councillors might be disallowed by the Governor, representation was as fair and liberal as before, while the basis of the suffrage was generously broadened.<sup>1</sup>

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<sup>1</sup> Provincial Laws, Vol. I., pp. 1-20. Hutchinson, Vol. II., p. 8; Vol. III., p. 84. Barry, History of Mass., Vol. I., pp. 513-14; Vol. II., Introduction, and pp. 16-18. Lodge, pp. 361 and 412. Doyle, Vol. II., pp. 372-6. Palfrey, Vol. IV., p. 76.



## APPENDIX A.

### DISFRANCHISEMENT.

To consider only the conditions by which admission to the franchise might be gained is to look at but one side of the shield. The Puritan leaders in Massachusetts never considered freedom an irrevocable gift. The freeman or the town that should be remiss in fulfilling public obligations had to stand in fear of disfranchisement.<sup>1</sup>

In the early days while the government, still unsettled, was vexed by various heresies and threatened by political attacks, it is not unnatural that loss of citizenship should have been the penalty for denying the power of magistrates, for petitioning in favor of heretical leaders, and even for "common railing."<sup>2</sup> In 1635, Endicott's anti-Papist zeal in defacing the English flag forced the General Court to "censure him to be sadly admonished of his offense," and to be "disinabled for bearing any office in the commonwealth for the space of a year."<sup>3</sup> For repeated drunkenness, and for "any other shameful and vicious crime by a freeman," the courts which should try the case were given power at their discretion to add disfranchisement to any other penalty imposed.<sup>4</sup> It was doubtless that strange fear of the Quakers which led in 1663 to the passage of the most far-reaching act of disfranchisement, decreeing that "all persons, Quakers and others, which refuse to attend upon the public worship of God established here, . . . whether freemen or others, . . . shall and hereby are made incapable of voting in all civil assem-

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<sup>1</sup> *Supra*, p. 38.

<sup>2</sup> Records, Vol. I., pp. 136, 175, 207, 267.

<sup>3</sup> Records, Vol. I., p. 146.

<sup>4</sup> Records, Vol. I., pp. 112, 118, 139; Vol. IV., Pt. II., p. 143.

blies during their obstinate persisting in such wicked ways and courses, and until certificate be given of their reformation.”<sup>1</sup> In the years which followed the futile labors of the Royal Commission, Massachusetts seemed willing to conciliate the King by unusual severity toward those who spoke of him without due respect. Thus, Wm. Stevens, for “speaking against His Majesty, our Sovereign Lord and King, Charles II.,” was “disfranchised from being a freeman, and from holding any office during the Court’s pleasure, and to pay £20 fine and costs of trial, and to be imprisoned one year.”<sup>2</sup> A curious case of disfranchisement occurred in 1680, when the court decided that as an inhabitant of Salem was a “factious, litigious townsman,” he should have no case before any civil judicature, sustain no office, and have no vote in town affairs during the pleasure of court.<sup>3</sup>

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<sup>1</sup> 1663, Records, Vol. IV., Pt. II., pp. 37-8.

<sup>2</sup> 1667, Quarter Court Records, quoted in History of Ipswich, Essex and Hamilton, p. 122.

<sup>3</sup> Annals of Salem, p. 265.

## APPENDIX B.

### THE CONFEDERATION OF 1643.<sup>1</sup>

Schemes of federation had been discussed by Massachusetts and Connecticut for at least five years before these two joined with Plymouth and New Haven in forming the United Colonies of New England. In 1643 both safety and expediency favored the formation of this league. The Civil War was waging fiercely in England, so that in case of attack the colonies could not look to the mother country for protection; they must be prepared to defend themselves. Again, the English government was then too much pre-occupied to notice this action of the colonies, which at any other time would surely not have passed unchallenged. The Maine colony was excluded from this league, "because they ran a different course from us both in their ministry and civil administration,"<sup>2</sup> while the Rhode Island plantations were repeatedly refused admission unless they would put themselves under the jurisdiction of one of the other colonies.

The sixth of the articles agreed upon in 1643 as the constitutional basis of the Confederation gave into the hands of eight commissioners the managing and concluding of all affairs which concerned the whole league. The bigotry of

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<sup>1</sup> Full of interest as is this first experiment in colonial federation, its connection with the subject of this paper is but slight. The materials for an extended study of this topic are: Acts of the Commissioners of the United Colonies, printed in Vols. IX. and X. of Plymouth Colony Records. Records of Mass., especially Vol. II., pp. 31, 35-6, 69-70. Winthrop, Vol. II., pp. 119-27. Bradford, pp. 257-60. Doyle, Vol. I., Cp. VIII., contains a valuable treatment of the whole subject. Goodwin, "The Pilgrim Republic," Cp. LI.

<sup>2</sup> Winthrop, Vol. II., p. 121.

Massachusetts and of New Haven found expression in the only qualification insisted on in these commissioners,—that they should “all be in church fellowship with us.”<sup>1</sup> Upon this board the four colonies were given equal representation. The agreement of six of the eight should be sufficient to determine any question; in case of the failure of six to agree, the matter with a record of the arguments was to be submitted to the General Courts of the four colonies. The commissioners were to meet annually, the capital of each colony having its session in turn.

The Confederation was from the first “little more than a committee of safety.” Its chief benefits doubtless were that it established a precedent for more thoroughgoing unions in the future, and that in this time of danger it enabled the colonies to present to their enemies, Dutch, French and Indian, a seemingly united front, where in fact there was little real union.

The great source of weakness in the Confederation was the equality of representation given to colonies of very unequal strength. Of an aggregate population of twenty-four thousand in the four colonies, Massachusetts contained fifteen thousand, while the other members had not more than three thousand each.<sup>2</sup> Possessing, thus, nearly two-thirds of the population within the limits of the confederated colonies, Massachusetts had to bear by far the heaviest burden both in taxes and military levies.<sup>3</sup> It is not strange, therefore, that Massachusetts proved an unruly member, and that, deprived of influence in proportion to her strength and burdens by the equality of representation, she was constantly trying in

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<sup>1</sup> Neither Plymouth nor Connecticut made church-membership a test of citizenship. Connecticut required that test only from her Governor.

<sup>2</sup> Thwaites, “The Colonies,” p. 157.

<sup>3</sup> These were assessed in proportion to the number of able-bodied men between the ages of sixteen and sixty. In the first levy Massachusetts furnished 150 men, Plymouth 30, Conn. 30, New Haven 25. Acts of United Colonies.

other ways to assert her pre-eminence.<sup>1</sup> Repeated instances of controversies with Massachusetts appear upon the records; she demanded representation in proportion to population, claimed for one of her commissioners the presidency of the board, insisted that her members should have precedence, and that the greater number of the meetings should be held at Boston.<sup>2</sup>

Another most serious defect was that the dealings of the commissioners were only with the General Courts in the several colonies. As in the Confederation of 1781, the central body could exercise no power directly upon individuals, and had no means of coercing the independent colonial governments. The consequence was that Massachusetts repeatedly refused to be bound by the decision of six of the commissioners.<sup>3</sup> Despite the constitutional pledge of compliance with such decisions, she now insisted upon "State rights," with a stubbornness which two centuries later seemed to her incomprehensible.<sup>4</sup>

Though changing somewhat in form, this Confederation

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<sup>1</sup> An interesting parallel is afforded by ancient Greek experience. "The equal voice accorded to large and small tribes alike in the votes of the Amphictyonic Council speedily robbed its conclusions of binding force in even the international politics of the states concerned. The powerful members of the Amphictyony naturally would not heed the dictation of its insignificant members." Woodrow Wilson, "The State," p. 81.

<sup>2</sup> The empty honor of signing next after the president was conceded to the Massachusetts commissioners. Acts of U. C., Vol. I., p. 17.

<sup>3</sup> It is interesting to notice that in 1638 Massachusetts proposed a scheme of federation in accordance with which the majority of the commissioners should have absolute power to determine any matter of difference, and that the scheme came to naught because Connecticut refused to be bound by majority rule. Winthrop, Vol. I., p. 342.

<sup>4</sup> She justified her refusal as a matter of "conscience"! "It can be no less than a scandal to religion that a General Court of Christians should be obliged to act and engage upon the faith of six delegates against their conscience," etc. Records, Vol. IV., Pt. I., p. 143, May 18, 1653.

of New England colonies lived its uncertain life, its vitality steadily ebbing, for forty years, until the arbitrary rule of Andros put an end to self-government in the colonies.<sup>1</sup>

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<sup>1</sup> The last meeting of the commissioners of the four colonies was held in 1664. It was then voted that in future the meetings should be triennial. Before they next assembled, contrary to the constitution of the Confederation, Connecticut had absorbed New Haven. In 1670 a new constitution was adopted by the three colonies.

Salary of Massachusetts Commissioners: According to Records, Vol. II., p. 70, they were to "have their charges, with two men and four horses during that service, allowed them out of the treasury."

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ENGLISH INSTITUTIONS AND THE  
AMERICAN INDIAN





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

X

ENGLISH INSTITUTIONS AND THE  
AMERICAN INDIAN

BY JAMES ALTON JAMES, Ph. D. (J. H. U.)

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## TABLE OF CONTENTS.

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	PAGE
I. Introduction . . . . .	7
II. Distribution of Indians in the Colonies . . . . .	8
III. The Iroquois . . . . .	9
IV. The French Policy . . . . .	12
V. General English Policy . . . . .	14
VI. English Land Tenure . . . . .	15
VII. The Reservation System . . . . .	19
VIII. Indian Trade . . . . .	22
1. Indian Trade in Plymouth Colony . . . . .	24
2. Indian Trade under the United Colonies . . . . .	25
3. Indian Trade in Massachusetts Bay Colony . . . . .	26
4. Indian Trade in Virginia . . . . .	27
5. Trade in Firearms . . . . .	28
6. Plans for Colonial Alliance and Indian Trade . . . . .	29
7. Trade in Liquors . . . . .	31
8. Criticisms on the English Trading Policy . . . . .	32
IX. Trading House System . . . . .	32
X. Indian Slavery . . . . .	42
XI. Early Provisions for Indian Education . . . . .	49
XII. Indian Superintendence . . . . .	57



# ENGLISH INSTITUTIONS AND THE AMERICAN INDIAN.

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## INTRODUCTION.<sup>1</sup>

The Indian Department of our government, in nearly all its varied changes, finds a more or less developed prototype in one or more of the original colonies. There is to be found in the factory system, laws of trade, provisions for the acquisition of lands, annuities, presents, superintendents, and Indian Agents of the United States, a very considerable part of early colonial legislation.

The Indian has long been a subject for discussion. The literature on the "Indian Problem" has a bulk unsurpassed by that relating to any other social topic except, perhaps, Slavery. Writers who have chosen this theme may be placed in two general groups: the one criticises any attempt to ameliorate the condition of the Indian through any governmental intervention; the other group sees only a series of wrongs from the first landing of the white man,—the Indian dispossessed of his birthright, enslaved and degraded.

It is not my purpose to be an historical critic farther than to note the growth of institutions largely set forth in the various colonial records and colonial legislative enactments. I have not attempted a complete exposition for every colony,

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<sup>1</sup> I am under obligations to Professor Herbert B. Adams, of Johns Hopkins University, and to Professor Frederick J. Turner, of the University of Wisconsin, for their kindly suggestions.

but have chosen Massachusetts, New York and Virginia as types, noting any important changes or variations which may have occurred in the other colonies. While dealing with English institutions, I have referred to the Spanish and the French policies. By such a comparison, common institutions become more significant and differences are more notable.

#### DISTRIBUTION OF INDIANS IN THE COLONIES.

The Indian, when seen by the first European, had made but little advance beyond the hunting and fishing stage. Tribal right to any particular region over which the tribe roamed,<sup>1</sup> to territory whereon rude cabins were erected, cannot be said to have been founded on any stronger basis than the right of present occupancy.<sup>2</sup> Inheritance obtained in a few instances, but conquest ordinarily accounted for possession.

The vast territory east of the Mississippi river<sup>3</sup> and between the Carolinas and Hudson's Bay was divided between the two great "families of tribes": the Algonquins and the Iroquois.<sup>4</sup> The earliest territory of the Iroquois family group<sup>5</sup> was almost wholly confined to the present limits of the State of New York.<sup>6</sup> Almost completely surrounding the Iroquois were the Algonquins. They occupied New England, nearly all of the Northwest territory, and parts of Pennsylvania, Virginia and New Jersey. Canada, New Brunswick and Nova Scotia were also in the possession of tribes speaking an Algonquin dialect.<sup>7</sup> There were a few

<sup>1</sup>Gallatin, *Indian Languages*, 150.

<sup>2</sup>See Colden Papers, N. Y. Hist. Soc'y Coll., 1877.

<sup>3</sup>See map in Gallatin, *Indian Languages*, 1, for location of Indian tribes in 1600.

<sup>4</sup>Parkman, *Pioneers of France*, 309.

<sup>5</sup>Jefferson's *Virginia*, 156.

<sup>6</sup>Charlevoix, (Shea) II., 188.

<sup>7</sup>Parkman, *Jesuits in North America*, Introduction, xx.

representatives of the Dakota race, Winnebagoes, who had seemingly wandered across the Mississippi river, and at the beginning of the seventeenth century were found on the shores of Lake Michigan.<sup>1</sup>

It is difficult to place in one class the Indians south of a line run westward from Cape Fear. The Cherokees and their near allies would doubtless have embraced the greatest number of these tribes. In general, the Cherokees proper lived among the mountains and occupied portions of the present States of Tennessee, Alabama, Georgia, and the Carolinas.<sup>2</sup>

South of this territory was that of the Creeks. The Chickasaws and Choctaws were located farther west, on the Mississippi river.<sup>3</sup>

The classification into the tribes noted has arisen from the well-marked distinctions between Indian languages.

#### THE IROQUOIS.

The Iroquois,<sup>4</sup> the Indian of Indians, "the thorough savage, yet a finished and undeveloped savage," occupy a unique position in the history of the struggle for the mastery between the rival powers of France and England in the New World. During the seventeenth and eighteenth centuries the confederated Five Nations<sup>5</sup> held the balance of power between these two contestants. No threats, promises or acts of diplomacy on the part of the French ever fully broke the chain which bound the Iroquois to the English. Indeed, but for this deadly hostility of the Iroquois to the

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<sup>1</sup> Parkman, *Jesuits in North America*, Introduction, xx.

<sup>2</sup> For Southwestern Indians, see Adair, *American Indians*.

<sup>3</sup> For Southern Indians east of the Mississippi river, see Gallatin, *Indian Languages*, 83, 84.

<sup>4</sup> For the Iroquois Confederacy, see L. H. Morgan's original work on the subject, and Fiske, *Discovery of America*, I., 75.

<sup>5</sup> Joined by Tuscaroras in 1715. This tribe was expelled from North Carolina.

French, New York might have been secured to Louis XIV.<sup>1</sup> In this case the whole current of American history would doubtless be different and federal union be unknown. "To this Indian league France must chiefly ascribe the final overthrow of her magnificent schemes of colonization in the northern part of America."<sup>2</sup> The Iroquois alliance with the English forms the chief fact in American history down to the year 1763. From it also arose indirectly many vexed questions, which were settled on the part of the government of the United States only after much diplomatic action and bloodshed. Why was their fealty<sup>3</sup> ever sworn to the English? By what steps did they become the "Scourge of God upon the aborigines of the continent"?<sup>4</sup>

At the time of the first French and English settlements the Iroquois were rapidly becoming the terror of the whole country. Outlying isolated tribes were falling rapidly under their powerful onset or were being scattered in all directions.<sup>5</sup> Says General Walker: "It will not do to say that but for the Iroquois the settlement of the country by the whites would not have taken place; yet assuredly that settlement would have been longer delayed, and have been finally accomplished with far greater expense of blood and treasure, had not the Six Nations, not knowing what they did, gone before in savage blindness and fury, destroying or driving out tribe after tribe, which with them might for more than one generation at least have stayed the western course of European invasion."<sup>6</sup>

John Smith met some of the Iroquois in canoes at the mouth of the Susquehanna river in the year 1608. They were then on the way to attack their enemies.<sup>7</sup> The Dela-

<sup>1</sup> Fiske, *Discovery of America*, II., 530.

<sup>2</sup> Morgan, *League of the Iroquois*, 11.

<sup>3</sup> N. Y. Doc. Hist., I., 99.

<sup>4</sup> Walker, *Indian Question*, N. A. Review, April 1873, 370.

<sup>5</sup> Gallatin, *Indian Languages*, 75.

<sup>6</sup> N. A. Review, April 1873, 370.

<sup>7</sup> Jefferson, *Virginia*, 350.



wares were defeated somewhat later and compelled to put themselves under the protection of the Iroquois.<sup>1</sup> Henceforth the Delawares, Lenni Lenappes, were known as "women." They were not to make war, but spend their time in gaining "subsistence for their families."

In the year 1609 the Iroquois proceeded against their Algonquin enemies who were allied with the Hurons. The Hurons were kindred of the Iroquois. That they were defeated and for a number of years remained in quietude may be accounted for by the fact of the presence of the French, armed with firearms,<sup>2</sup> under the leadership of Champlain.

After the recoil of the Iroquois from the arquebuses of Champlain, these Indians regard the "gun as a devil." They saw in this weapon the superiority of their enemies, and were willing to make any sacrifice to obtain it. Free traders from Holland traded a few guns to the Mohawks.<sup>3</sup> Four hundred warriors were later supplied with arms.<sup>4</sup> Now began those raids which led to absolute supremacy over all the other tribes east of the Mississippi. In 1649 the Iroquois overwhelmed the Hurons<sup>5</sup> and put the Jesuit missionaries to death. Before the year 1670 the Iroquois were victors over the Adirondacks of Canada and had also taken possession of the territory between lakes Huron, Erie and Ontario, land extending nearly to Montreal.<sup>6</sup> "No distant solitude," says Morgan, "or rugged fastness was too obscure or difficult to escape their visitation; no enterprise was too perilous, no fatigue too great for their courage and endurance."<sup>7</sup>

The Iroquois claimed by right of conquest the territory reaching from Lake Superior to the Tennessee river and

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<sup>1</sup> Jefferson, Virginia, 352.

<sup>2</sup> Charlevoix, Shea, III., 45.

<sup>3</sup> N. Y. Doc. Hist., IV., 5.

<sup>4</sup> Charlevoix, Shea, II., 138.

<sup>5</sup> N. Y. Col. Doc's, VI., 908.

<sup>6</sup> Morgan, League of the Iroquois, 12.

<sup>7</sup> Morgan, League of the Iroquois, 13.

from the mountains to the Mississippi.<sup>1</sup> At various places throughout their territory they founded colonies in order that they might maintain possession and exact tribute. The power of this confederacy, then, as a bulwark against the advance of the French may be easily comprehended.<sup>2</sup>

It remains to trace the Indian policies of the French and the English as largely developed through the attempts of these peoples to gain supremacy over the then powerful Iroquois.

#### THE FRENCH POLICY.

With reference to the general policy of the French, Governor Lewis Cass said: "There is a peculiar elasticity in French character. The Frenchman accommodates himself to any situation in which he may be placed. Upon the Seine and upon the St. Lawrence, if not equally pleased he is equally pleasant, and during two centuries, in the depths of the American forests, he has associated with their rude tenants, and as he could not elevate them to his own standard he has descended to theirs."<sup>3</sup>

The French always sought to hold the balance of power between adverse tribes. They desired to be the chief influence in Indian councils,<sup>4</sup> and tried to envelop in the network of French power the most remote hordes. French principles grew out of actual relations with the tribes. Officers who administered the affairs saw the necessities of the situation and acted in accordance. The methods adopted were many of them similar to those by which Spain gained supremacy in the South. In turn the English finally sought to adhere to the means of diplomacy which had been used by the French.<sup>5</sup> The advance of Champlain in 1609<sup>6</sup> was in a sense the prototype of the future advancement of the nation he represented.

<sup>1</sup> Doc. Hist. N. Y., I., 66.

<sup>2</sup> N. Y. Col. Doc's, IV., 478.

<sup>3</sup> N. A. Review, Vol. 24, 368.

<sup>4</sup> Penn. Archives, VI., 8.

<sup>5</sup> N. Y. Col. Doc's, IV., 208.

<sup>6</sup> Parkman, *Pioneers of France*, 337.

Previous to 1620 large numbers of French, singly or in parties, accompanied by savage bands, had penetrated the depths of the wilderness. They went as adventurers and traders<sup>1</sup> and rarely did they meet with a mishap. Their welcome was more certain in that many became through marriage members of a tribe.<sup>2</sup> The French government recommended intermarriage. When the French, by adoption,<sup>3</sup> became members of a tribe their advice had great weight in the council. They treated the Indians with that firmness and tact which was very different from the coldness of the English. The French humored them even while inspiring them with wholesome terror. Savage insolence was repressed through an outward giving of contempt for contempt.<sup>4</sup> Martial law obtained in the trial of criminals, and this summary justice was feared and respected by the Indians.

Quite different was English procedure. The Indian on trial for the murder of an Englishman was surrounded by all the safeguards of the English criminal law. Such "conscientious clemency" the Indians early despised as weakness.

The French never professed to plant colonies in America on an agricultural basis. Strategic points were seized. To these outlying posts the Indians were attracted through trade and held by religious conversion.<sup>5</sup> No negotiations were made for the national occupancy of land. Thus was the most fruitful source of disagreement avoided. From a treaty of the year 1666<sup>6</sup> we glean these distinguishing points: French families were to settle in the Huron country; suitable lots were granted in which cabins were to be erected;

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<sup>1</sup> N. Y. Col. Doc's, IV., 207.

<sup>2</sup> N. Y. Col. Doc's, V., 626.

<sup>3</sup> Winsor, Narr. and Crit. Hist., V., 4.

<sup>4</sup> Charlevoix, Shea, New France, II., 27.

<sup>5</sup> For Jesuit influence see Parkman, Jesuits in N. A., 48, 160; Parkman, Frontenac and New France, 374; Halkett, North Am. Indians, "Jesuits."

<sup>6</sup> N. Y. Col. Doc's, III., 124.

hunting and fishing were to be in common; Indian protection should be extended to the French.

A generous supply of goods to meet the wants of the natives did not fail to win their good will or command their services. "The relations thus established between the French and the natives continued down till even after the extinction of the territorial claims of France."

#### GENERAL ENGLISH POLICY.

In the article previously referred to Governor Cass says: "If any restraints were imposed by the British authorities before our Revolution upon the Indian traders, either in relation to their general conduct or the price of their goods, such restraints have escaped our investigation. . . . There was no attempt to provide a permanent residence for the Indians. There were no schools and no efforts to introduce agriculture or the mechanic arts. There were no annuities and no regulations to direct the conduct of the traders."

While the general policy of the English is vulnerable at diverse points, the sweeping criticism of Governor Cass, a reflection of the thought of his time, carries wide of the truth.

In the earliest dealings with the Indians the original colonial policy of the English was, it is true, quite different from that of the French. The precedent of the Anglo-Saxon race forbade that ready admixture with the natives which was characteristic of the French, and also the strong bond between the Indians and the Spaniards.<sup>2</sup> The English did not come for a transient trading expedition, but to found agricultural communities.<sup>3</sup> These formed a background for the protection of the colonies as they reached out into

<sup>1</sup> Winsor, *Narrative and Critical Hist. of America*, IV., 297.

<sup>2</sup> There were a few intermarriages between the English and the Indians in New England. See Weeden, *Economic History of New Eng.*, I., 403.

<sup>3</sup> *Duke of Yorke's Book of Laws for Penn.*, 1676, 413. N. Y. Col. Doc's, IV., 207.

the wilderness, establishing settlements or carrying on their traffic with the natives.

In considering the English relations it must be noted that the independent position of the colonies rendered them more liable to transgress than had they been under one ruler.<sup>1</sup>

#### ENGLISH LAND TENURE.

No relationship between the early colonists and the natives has been more productive of discord than the tenure of land. Especially was this true among the isolated colonies. From the first, the English assumed the right of ownership based on the laws of nations. The Indians were granted the right of occupancy. Purchase or conquest was necessary in obtaining the *dominium utile*. Later, the Indians came to be regarded as foreign nations, allies of the King.<sup>2</sup>

One article of the treaty of alliance usually put the lands occupied by the tribe under the protection of the crown.<sup>3</sup> When the colonists came to make a bargain, the tribes were unable to define the limits of their land. Some of the tribes claimed all of the land within the bounds of another tribe, or held as theirs large tracts claimed by other tribes. Two purchases were necessary or war was inevitable. The Indian cared only for the game on his land. Price was unknown to him until the whites made purchases. Mr. Weeden states<sup>4</sup> that the transfer of land from native owners to the white settlers was fairly done in New England. "We forget," he says, "that the value of every soil is in the atmosphere of intelligence, industry and virtue diffused over it by resolute and enduring citizens." It is to be remembered that the New England Indians had been reduced by the Iro-

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<sup>1</sup> Parkman, *New France under Louis XIV.*, 394.

<sup>2</sup> N. Y. Col. Doc's, VI., 541.

<sup>3</sup> N. Y. Col. Doc's, VII., 541.

<sup>4</sup> See Weeden, *Economic Hist. New England*, I., II.

quois' and did not at first impede the possession of the English. The colonists who settled at Plymouth "found divers cornfields and little running brooks, a place . . . fit for situation,"<sup>2</sup> and settled on the Indian clearings.

Purchase of land from the Indians, without license from the General Court, was prohibited by the early legislature of Massachusetts, and the natives were to have the right to any lands possessed and improved by themselves.<sup>3</sup> Governor Winslow, of Plymouth, in his report to the Federal Commissioners in 1676, confirms the statement that there was an attempt at justice on the part of the colonists in their early relations with the Indians as regards land purchases. What he says of Plymouth seems to have been equally true of the other English colonies. "I think I can clearly say that before these present troubles broke out the English did not possess one foot of land in this colony but what was fairly obtained by honest purchase of the Indian proprietors. Nay, because some of our people are of a covetous disposition, and the Indians are in their straits easily prevailed with to part with their lands, we first made a law that none should purchase or receive of gift any land of the Indians without the knowledge and allowance of our Court. . . . And if at any time they have brought complaints before us, they have had justice impartial and speedy, so that our own people have frequently complained that we erred on the other hand in showing them overmuch favor."

The East Hampton Book of Laws for the New York colony provided that no purchase of lands from the Indians after the year 1664 should be valid unless the sachem of the tribe was brought by the purchaser before the Governor. After satisfaction was rendered the chief, the lands were recorded in the colonial office.<sup>4</sup>

<sup>1</sup> Parkman, *Jesuits in N. A.*, 21.

<sup>2</sup> Bradford, *Plymouth Plantation*.

<sup>3</sup> Winthrop, *Hist. of New Eng.*, I., 116.

<sup>4</sup> *N. Y. Hist. Soc'y Coll's*, S. 1, Vol. I., 354.

One of the transfers of 1683 may be noted as typical. The conveyance consisted of lands owned by the Cayugas and Onondagas, situated on the Susquehanna river and including their right to the river itself. They were to receive in return "a half piece of Duffels, Two Blankets, Two Guns, Three Kettles, Four Coats, Fifty lbs. of Lead, and five and twenty lbs. of powder."<sup>1</sup>

Governor Burnet in 1721 sent the following order to his agent: "When you have Pitch'd upon a convenient place for a Trading House you are to endeavor to purchase a Tract of Land in the King's Name and to agree with the Sinnekes for it which shall be paid by the Publick."<sup>2</sup>

The policy instituted by Penn<sup>3</sup> seems to have been followed by the colony of Pennsylvania throughout its subsequent history. All differences were to be settled by a tribunal wherein both parties should be represented.<sup>4</sup> No lands were to be sold any private persons by the Indians. Nor was any purchase valid except that made by Penn or his commissioners.<sup>5</sup> Any one who refused to submit to such ruling not only lost the land he bought, but was subject to a fine of ten shillings for every hundred acres so purchased.<sup>6</sup>

As previously noted, the Delawares were subdued before Penn's coming, and would doubtless have graciously submitted to a code less just. Such was the strictness of the rulings in behalf of justice towards this almost vanquished tribe, that hunters on Indian lands not purchased by the proprietors were fined fifty pounds or were imprisoned twelve months.<sup>7</sup> For every offense against the law regarding the survey of unpurchased lands there was a penalty of

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<sup>1</sup> Doc. Hist. N. Y., I., 261.

<sup>2</sup> N. Y. Col. Doc's, V., 642.

<sup>3</sup> Penna. Col. Records, III., 288.

<sup>4</sup> Quoted in Hazard's Annals Penna., I., 519.

<sup>5</sup> Penna. Col. Records, III., 344.

<sup>6</sup> Duke of York's Book of Laws for Penna., 1676, 143, 209.

<sup>7</sup> Laws of Penna., 1722, 273.

five hundred pounds and twelve months imprisonment without bail.<sup>1</sup>

A proclamation by the Governor of Virginia in 1609 sets forth the expectant policy of the English: "Wee purpose to proclaime and make it known to them all, by some publike interpretation that our comming thither is to plant ourselves in their countrie; yet not to supplant and roote them out but to bring them from their base condition to a farre better."<sup>2</sup>

An act passed in the year 1705 provided that no person should under any pretext take possession of land held by the Indians. Any one convicted of such a charge was to pay ten shillings for every acre of land so occupied.<sup>3</sup> Jefferson believed, after a careful examination of the records, that the greater part of Virginia had been acquired by "purchases made in the most unexceptionable form."<sup>4</sup>

The statement made by Chancellor Kent with regard to the extinguishment of Indian titles to land in New England may be applied with equal significance to the other colonies. He says: "The people of all the New England colonies settled their towns upon the basis of a title procured by fair purchase from the Indians with the consent of government, except in the few instances of lands acquired by conquest after a war deemed to have been just and necessary."<sup>5</sup>

<sup>1</sup> Laws of Penna., 1722, 355. Hazard's Annals Penna., I., 437, 442.

See Memoirs of the Penn. Hist. Soc'y., Vol. III., part II., for the records of a treaty, one article of which pertains to the purchase of the site of Philadelphia from the Indians. "For and in consideration of 200 fathom of wampum, 30 fathom of duffels, 30 guns, 60 fathom of strong waters, 30 kettles, 30 shirts, 20 gun-belts, 12 pair shoes, 30 pair stockings, 30 pair scissors, 30 combs, 30 axes, 30 knives, 21 tobacco tongs, 30 bars of lead, 30 pounds of powder, 30 awls, 30 looking glasses, 30 tobacco boxes, 3 papers of leads, 44 lbs. of red lead, 30 pair of hawks bells, 6 drawing knives, 6 caps, 12 hoes."

<sup>2</sup> Force Papers, I., Nova Britannia, I., 1609.

<sup>3</sup> Laws of Virginia, 1705, LII., sec. 2.

<sup>4</sup> Jefferson, Virginia, 153.

<sup>5</sup> 3 Kent Comm., 391.



## THE RESERVATION SYSTEM.

The system of land reservations was developed simultaneously with land purchases in all the colonies. Virginia as early as 1656 seems to have had a well-matured plan for the formation of reservations.<sup>1</sup> It was enacted by the Assembly in the above year that any lands possessed by the Indians, reserved to them by any act of Assembly, should not be alienable, because of the consequent necessity to make new allotments of lands and possessions. This was not to preclude any alienation made through bargain or sale and with the assent of the Assembly.

Commissioners of the United Colonies agreed in 1658 to a system for setting aside lands for the exclusive use of the Indians.<sup>2</sup> A grant made by them may be taken as typical. It provided that "Coshawashett and his Companie shall have a meet proportion of land att Squams cutt necke on the East side of parketuck River and Cashasinnimon and his Companie shall have a fitt proportion of land alowed them att Wawarramoreke neare the path that leads from the mouth of Misticke River; and it is Comended to the Generall Court of Conecticott to appoint as soon as may bee some meet psons to lay out and bound the said lands for them."

Plymouth Colony, in 1685, granted lands to the "South Sea Indians," which lands were never to be alienated or sold without the consent of all the tribe.<sup>3</sup> We note in this a very common form of statement used in the treaties made between the United States government and the various "nations" of Indians.

There was no provision in the Massachusetts Bay Colony for the definite setting aside of lands for the Indians, other than that made through the influence of the great

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<sup>1</sup> Hening: Statutes of Va., I., 396.

<sup>2</sup> Plymouth Records, X., 199.

<sup>3</sup> Plymouth Col. Records, VI., 159.

missionary John Eliot.<sup>1</sup> This latter policy was sanctioned by the General Court. Several townships of land were set aside for the exclusive habitation of the "Praying Indians." The villages and surrounding plantations varied in size according to the numbers of Indians. It was thought by such arrangement that: (1) All differences in future times with regard to the proprietorship of land between the English and the Indians would thus be removed; (2) The Indian would have a definite tract of land which could not be sold, thus rendering him destitute and discontented.

Connecticut by the year 1680 had also a well-developed reservation system. Allotments of land were made to the tribes. These were recorded and duly descended to their heirs. The Indians were not allowed to sell their lands, and any Englishman who purchased a part of such tracts forfeited his purchase and treble the amount of money paid.<sup>2</sup>

The colony of Connecticut seems to have been the first to pauperize its Indians by the introduction of a system of annuities,—a system which as it has developed since the year 1683 has tended to deprive the Indian of all traces of independence. A committee was appointed by the General Court, in the year given, for the purpose of assigning the Pequots a tract of land sufficient for them to cultivate. This failing, certain unimproved lands were to be assigned them. A law was then passed which required every town to provide for the maintenance of its own Indians.

Many forms of self-government were advocated for the Indians settled on reservations. These varied from the indirect authority exercised by the Plymouth Colony through three native rulers<sup>3</sup> to the military organization of John Eliot, by which there was chosen by the Indians "one ruler of a hundred, two rulers of fifties, and ten rulers of ten."<sup>4</sup>

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<sup>1</sup> Mass. Hist. Coll's, I., 179.    <sup>2</sup> Conn. Col. Records, 1678-1689, 56.

<sup>3</sup> Plymouth Col. Records, V., 215.

<sup>4</sup> Neal's History of New England, Chap. VI., 254.

Another feature of Indian government was that allowed by the Massachusetts Bay Colony. In 1763 this colony set aside the district of Mashpee, wherein the Indians were given a large part of the governing powers.<sup>1</sup> They met annually in the public meeting-house. A moderator of the meeting was appointed. Other officers elected were five overseers, three of them Indians; a town clerk and treasurer, both English; two wardens, and one or more constables. The overseers had the power to regulate the fisheries in the district, to apportion to the Indians their uplands and meadows, and lease such lands and fisheries as were held in common. The profits arising from the leases were used to support indigent Indians.

The firm belief in the ability of Indian officials was not lost even after the abandonment of these early trials of native rulers. Probably no fact better illustrates the attachment to the doctrine and at the same time shows the fears existing among Americans with regard to the English and Indian alliances at the outbreak of the Revolutionary War than does one of the sections in the treaty of Pittsburg. This agreement, entered into in the year 1778 by congressional commissioners with the Delaware tribes, proposed on the part of the United Colonies that the Delawares and certain other tribes form a separate State. They were to be admitted as one of the members of the Union on the completion of such an organization. It is doubtful if this plan ever could have succeeded. The exalted position thus tendered the Indians had but little effect in comparison with the arms and trinkets so profusely bestowed on them by the English agents.

The granting of lands in severalty was a system commended by the colonists, but was not in vogue at an early date. In 1746, as the earliest example, we find that Massachusetts Bay Colony, through the General Court, appointed land committees of three persons. One of these committees

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<sup>1</sup> Province Laws, 1763, IV., Chap. III., Section I., 640.

was to reside near each Indian plantation in the colony.<sup>1</sup> The committees had charge of the communal lands, and allotted to individual Indians such a portion of the land and meadows as the natives were able to improve.

Another unique feature of the early colonial legislation was that which provided for defeated tribes. This law indicates the survival of feudal ideas. The Virginia Assembly agreed, in 1646, to protect an Indian "king" against his enemies in consideration of twenty beaver skins, to be paid by him "att the goeing away of Geese yearely."<sup>2</sup> One of the articles of peace between this colony and certain tribes, in 1677, provided for the payment of "3 arrows for their land, and 20 beaver skins for protection, every year."<sup>3</sup>

Plymouth Colony affords an even more notable survival in the following enactment:<sup>4</sup> "Libertie is graunted vnto eight of the souldiers, Indians, which haue bine in the service, may sit downe and plant att Saconett, Capt. Church accomodateing them with land on condition that they shal be redy to march forth vnder the comaund of Capt. Church when hee shall see cause to require them for the further psueing and surprising our Indian enimies."

#### INDIAN TRADE.

The trader has always been a pathfinder for civilization. Whether we consider the Phoenicians as they took possession of the Mediterranean coasts, or made their way to Cornwall and the Baltic; the Romans as they pushed their roads into the heretofore unbroken wilderness; or the English and Dutch in South Africa to-day,—they all illustrate the same striking truth. Though they exploit the natives at every step, they bring those who are able to survive the onset to a higher plane of life. The Phoenician carried his

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<sup>1</sup> Province Laws, 1746, III., Chap. XII., Section I., 306.

<sup>2</sup> Hening, Statutes of Va., I., 323-326.

<sup>3</sup> Spottswood Letters, I., 25.

<sup>4</sup> Plymouth Col. Records, V., 225.

borrowed alphabet with him, and as he traded from place to place along the coast, or later founded his trading station which was to grow into a European town, left with the peoples with whom he came into contact not only the alphabet, but also Babylonian weights and measures and other inventions derived from the Orient. Roman roads became the easy means not only for a transfer of Roman goods and armies, but gave the Teutons ready entrance into the empire when they were prepared for their historic forays.

The material comfort of the Indian was considerably increased after his contact with the French and English traders. Hitherto the savage want of foresight and thrift had been wont to involve him during the long winters in a dreadful struggle against famine and disease. By the aid of iron utensils the native became a much greater producer. It is related by Governor Bradford that there was a surplus of corn among some of the tribes. The Narragansetts could sell 500 or 1000 bushels at a time.<sup>1</sup>

That there was intertribal trade among the Indians previous to the coming of white men to America cannot be doubted. The earliest Spaniards pushed ever on, to the west and northwest, incited by the stories of the coast Indians that their golden ornaments came from peoples who lived far inland in these directions. Early travelers attest the fact of a widespread native trade. Differences in language were obviated by the use of signs.<sup>2</sup> Some of the North Atlantic tribes had a currency.<sup>3</sup>

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<sup>1</sup> Mass. Hist. Soc'y Coll., Ser. 4, III., 129.

<sup>2</sup> Force Tracts, II., 17, 29.

<sup>3</sup> "Their money consists of beads, neatly cut out of brown or white cockle, mussle or oyster shells, through which they bore a hole and string them together on a thread like pearls; these they call Zeband (Wampum). In trade they measure those strings by their length; each fathom of them is worth five Dutch guilders, reckoning four beads for every stiver. The brown beads are more valued than the others and fetch a higher price; a white bead is of the value of a piece of copper money; but a brown one is worth a piece of silver." *Memoirs of the Penn. Hist. Soc'y*,

The Indian was not only a producer for the colonist, but aided him by his labor; "unsteadily, it is true, but in the great need of the new plantations any labor obtainable became a desirable factor."

Even before their necessities were supplied the colonists began to traffic for furs. Wampum, in small quantities, was introduced into New England by Dutch traders.<sup>1</sup> In exchange for wampum the Indian brought the beaver, then everywhere in good demand.

#### INDIAN TRADE IN PLYMOUTH COLONY.

According to Winthrop, 10,000 beaver skins were brought annually to the Dutch from the Great Lakes.<sup>2</sup> In September of their first year the Plymouth men sent out a shallop to trade with the Indians, and when a ship arrived from England in 1621 the colonists speedily loaded her with a return cargo of beaver and lumber.<sup>3</sup> The Plymouth Colony had two ships built for the trade. A report of 1625 refers to their return from an expedition, the smaller one "fild with goodly cod-fish taken upon ye banke . . . and besides she had some 800 lbs. weight of beaver besides other furs to a good value."<sup>4</sup>

From this same report it seems that Plymouth trade was under the direction of two factors chosen by the Company. They were to have charge of the "catle, cloath, shoes, hose, leather etc.," to be used in the trade, to make exchange for furs and ship them to England.

The colony, however, in 1626,<sup>5</sup> purchased the right to

III., Part I., 131. Weeden, *Economic and Social History of New England*, I., 33-46. Weeden, *Johns Hopkins University Studies*, 2nd Ser., VIII., IX., 27.

<sup>1</sup> Mass. Hist. Coll., Ser. 4, III., 234.

<sup>2</sup> Winthrop, I., 113 *et seq.*

<sup>3</sup> Bradford, *New England*, 104. Turner, *J. H. U. Studies*, Ser. IX., 12. For further accounts of early trade see Turner and Weeden.

<sup>4</sup> Mass. Hist. Coll., Ser. 4, III., 202.

<sup>5</sup> *Ibid.*, 212.

trade and to sell land by the yearly payment to the Company of 200 pounds, for nine years. In order that this debt might be met, the trade was to be in common and shares sold. Each single freeman might buy one share, and every father of a family was allowed to purchase as many shares as he had persons in his family.<sup>1</sup> As the colony was unable to meet its payments, the trade was let in 1627 to a company of twelve "undertakers" for a period of six years. At the end of this time the colony was again to assume control.<sup>2</sup>

#### INDIAN TRADE UNDER THE UNITED COLONIES.

In the Hartford meeting of the Commissioners from the United Colonies, in 1644, various plans for Indian trade were discussed. Some of the commissioners advocated separate colonial jurisdiction; others favored a "renting out" of the trade. There were those again who were willing to sanction individual and indiscriminate traffic. It was finally decided that there was to be trade in common.<sup>3</sup> From five to six thousand pounds sterling were thought a sufficient sum with which to begin the trade. It was agreed that every man throughout the colonies was to have the liberty to pay into the general fund. No one was to have less than twenty pounds of stock. Each was to put in his "pporcon vnder his owne name or diuers may put in vnder the name of some one whom they genally trust and are satisfied in." The latter are to be known as "undertakers" and all others as "adventurers."

In each jurisdiction the undertakers were to choose "committees" of two or three to manage the joint stock. This management was to consist in "puiding Comodities for trade, settling trading houses, hiring factors or servants to trade with the Indians, receiuing the Beauer or other pceed of the trade from them with accounts from

<sup>1</sup> Mass. Hist. Coll., Ser. 4, III., 215.

<sup>2</sup> *Ibid.*, 226.

<sup>3</sup> Plymouth Colony Records, IX., 22.

time to time and what els may be necessary and ordered.” This way of trading was to continue for ten years. The committees were to report to the commissioners at their yearly meetings. After paying the managers such a sum as the undertakers “thought fit,” the profits were to be divided. Each jurisdiction was to receive such a portion of the profits as the commissioners in conjunction with the committees agreed upon.

#### INDIAN TRADE IN MASSACHUSETTS BAY COLONY.

Previous to the ratification of the plan above mentioned, the Massachusetts Bay Colony, in 1645, had given the exclusive Indian trade for three years to a trading company.<sup>1</sup> The rights of this company were probably purchased for the united colonies. At any rate, there was a joint trade for the period stated. The stock seems to have been much smaller than that originally recommended.

Massachusetts acquired ever-increasing power in the union. While the original plan of trade did not fail at the end of the ten years, the general direction of the trade was transferred to the commissioners from Massachusetts Bay and Plymouth colonies. Finally, in 1657, Massachusetts Bay Colony declared that the trade in furs within her jurisdiction was to be carried on for the benefit of that common-

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<sup>1</sup> See Plymouth Col. Records, X., 133-138-165. This invoice of goods is a general type of those ordered by the corporation:

“Imprimis six flocke bedds and bolsters

It six paire of blanketts

It six good Irish Ruggs

It a duzen or two of bed coards

It in Nailles the greatest quantitie to bee 6, 8, 10, some 4 penies  
a few dubble tens none greater in all aboute 50£

It in hookes and hinges 03£

It in good Carpenters tooles espetially axes of the best sort  
broad and narrow augers and chisels and in good hoes broad  
and narrow 10£

It in good Dowlis 40£

It Cottens 30£

It Canvas 50£

<sup>2</sup> Mass. Records, III., 53, 54.



wealth.<sup>1</sup> Six commissioners, or any three of them, were to decide on the best way of making "contract with such able and honest persons as shall tender themselves to prosecute the Indian trade for the best benefit of the country." Those who engaged in the trade other than in this manner were to be fined 100 pounds.<sup>2</sup>

This colony in 1668 agreed, on the payment of £600 sterling, to farm out to one Richard Way the entire Indian trade. He was to have for the space of three years "all & euery benefit & advantages any ways accrewing to the country by virtue of the impose of wjne, brandy, & rumme, with beavers, furrs & peltry, from hence to be traded with the Indians, together with the rates of drawing of wine from the vintners." At the end of this time the trade passed again into the hands of the colony.

#### INDIAN TRADE IN VIRGINIA.

Trade was at first largely carried on in the different colonies by private traders. How to restrain these traffickers from taking undue advantage of the natives and still foster trade was a vexed question. Licenses were required for trading in all the colonies.<sup>4</sup>

The Virginia Assembly, in 1637, made it felony to barter with the Indians. This act was repealed two years later, and trade with them was punished by imprisonment at the discretion of the Governor and Council.<sup>5</sup> In 1656 all free-men were given the privilege of trading without seeming restriction.

Virginia again found it necessary to limit this freedom by bringing the Indian trade more completely under governmental surveillance. This led to the novel attempt in 1677 of establishing fairs throughout the colony.<sup>6</sup> There were

<sup>1</sup> Mass. Records, IV., 291.

<sup>2</sup> N. Y. Col. Doc., III., 243.

<sup>3</sup> Mass. Rec., IV., Part 2, 398.

<sup>4</sup> N. Y. Col. Doc., III., 243.

<sup>5</sup> Hening's Statutes at Large, I., 227.

<sup>6</sup> Hening's Statutes at Large, II., 410.

to be seven fairs held at places designated by the justices of the peace in the different counties, on the James, Rappahannock and Potomac rivers and in Accomac and Northampton counties respectively. The coming together at these stated places occurred twice each year, and the "ffaires" continued "fforty dayes and no longer."

The Indians were to be allowed to bring any commodities which they might wish to trade and "sell or truck for the same with the English, resorting thither, but noe where else for any commodities whatsoever." Any Englishman who traded with the Indians at any other times or places was fined 5000 pounds of tobacco for each offense, one-half of which fine was to go to the informant and the remainder to the colony.

Provision was also made for the appointment by the Governor of a clerk, in case the county clerk did not serve, at each of these fairs. His duties were to keep account of all articles bought and sold. In payment of the clerk's fee one-twentieth was set aside, and the Governor's dues were similarly reserved. Although fairs seemed a good solution of the inherent difficulties of trade, they were abandoned, and Virginia in 1691 repealed all acts which limited and restrained free trade with the Indians.<sup>1</sup>

#### TRADE IN FIREARMS.

So long as the Indian was unsupplied with firearms, the various regulations tended to secure a generally peaceful trade. When he learned the use of the gun he was no longer willing to submit to the bargains made by the white man, but set up for himself. From the time when the Dutch furnished the first four hundred Iroquois warriors with firearms, the Indians were willing to make any sacrifice to obtain the coveted treasure. Unscrupulous private traders were willing to supply them. How to restrain these

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<sup>1</sup> Hening's Statutes at Large, III., 69, renewed in 1705, III., 468, 469.

traders and keep the Indians friendly were questions which became the basis for frequent legislative enactment.

Money fines seem to have arisen in the futile attempt to blot out this trade. As early as 1633 Massachusetts Bay Colony enacted that no person should sell any arms or ammunition to any Indian upon the penalty of ten pounds for every gun, five pounds for a pound of powder, and forty shillings for a pound of shot.<sup>1</sup> The Bay colony, when it entered on a monopoly of the Indian trade in 1657, passed an act that no person should trade with the Indians except such as were given a license. For every offense the penalty was 100 pounds. To such as did have a license there was given the liberty to sell guns, powder and swords at will. By these means the Indians were soon abundantly supplied.

Indian outbreaks, with accompanying carnage, taught the colonists that they had made of their savage neighbor a not-to-be despised adversary. Laws against unlicensed traders, and especially against any trade in firearms, became more and more exacting. Plymouth Colony even went so far as to publish that any one convicted of furnishing Indians with arms should be put to death.<sup>2</sup>

#### PLANS FOR COLONIAL ALLIANCE AND INDIAN TRADE.

During the course of a century previous to the overthrow of the French power in America, the English, now by confederation, in which they placed a barrier to savage encroachment, now by laws and presents, strove to make the Indians fit allies to stop all French approaches.

Franklin saw clearly the need for much solicitation on the part of the English. In the plan for union of 1754, he urged upon the commissioners from the colonies "that they make such laws as they judge necessary for regulating all Indian trade." He added: "Many quarrels and wars have arisen between the colonies and Indian nations through the

<sup>1</sup> N. Y. Col. Doc's, III., 243.

<sup>2</sup> Plymouth Col. Rec., V., 173.

bad conduct of traders who cheat the Indians after making them drunk, to the great expense of the colonies both in blood and treasure. Particular colonies are so interested in the trade as not to be willing to admit such a regulation as might be best for the whole; and therefore it was thought best under a general direction."

After the outbreak of hostilities between England and France, the English exercise still greater care in the protection of the Indian trade. A proposed plan of Secretary Wraxall sets forth an almost ideal Indian agency.<sup>1</sup> He advocates an intendant of trade to reside at Oswego. This intendant was to receive a stated salary and was not to be in any way concerned in the Indian trade. His duties were to endeavor to discover all frauds and impositions on the Indians; to inspect all weights and measures and see that they were of an equal standard. Further, he was to bring all offenders to trial before the commission officer of the garrison and send all convicted to New York in irons. In addition, no trader was to presume to carry on trade unless he had a license from the intendant. Every trader was to give a bond of 500 pounds that he would observe all laws and regulations.<sup>2</sup> The superintendent was to have the privilege of giving instructions to and, if need be, to suspend the intendant.

The English strove hard to regulate the trade after the peace of 1763. General Gage, in 1764, was advised by the Council to "prohibit all hostilities against the Indians and to open trade with them."<sup>3</sup> He was to give orders to the commanders of the several posts that they should allow no trader to pass unless he had a license from the Governor. Nor were they then to be allowed to sell beyond the so-called Christian settlements.<sup>4</sup> It is worthy of note that the

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<sup>1</sup> N. Y. Col. Doc's, VII., 27.

<sup>2</sup> See Colden Letters, II., N. Y. Hist. Soc'y Colls., 1877.

<sup>3</sup> Colden Letters, I., 260. N. Y. Hist. Soc'y Colls., 1876.

<sup>4</sup> Colden Letters, I., 419. Also 383, 441, 461.

chief cause for the coming together of the commissioners from the several colonies was incidentally to make some general plan for Indian trade. On the success of these regulations depended peaceful relations with the savages. May it not further be said that in these trade confederations was established that fellow-feeling between the colonies that rendered their final union much more effective.

In 1769 the assemblies of the colonies were given the power to regulate the Indian trade.<sup>1</sup> As this was not effective, New York, in the year 1770, issued a call to the Governors of the other colonies and of Canada for the appointment of commissioners to meet in July.<sup>2</sup> At that meeting in New York there were present representatives from Quebec, New York, Pennsylvania and some of the Southern colonies. Patrick Henry was the commissioner from Virginia. As there was not a complete representation, no definite plans seem to have been formulated.

#### TRADE IN LIQUORS.

Says Lowell: "The temperance question agitated the fathers very much as it still does the children. We have never seen the anti-prohibition argument more cogently stated than in a letter of Thos. Shepard, minister of Cambridge, to Winthrop, in 1639: 'This also I doe humbly intreat, that there may be no sin made of drinking in any case one to another, for I am confident he that stands here will fall and be beat from his grounds by his own arguments; as also that the consequences will be very sad, and the thing provoking to God & man to make more sins than, as yet is seene, God himself hath made.'"<sup>3</sup>

Whatever moderate drinking might be allowed among themselves, the colonists early learned to fear the influence of liquor on the Indians. No laws appear oftener on the colonial statute books than those against this traffic. It

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<sup>1</sup> Colden Papers, II., 184.

<sup>2</sup> *Ibid.*, 206, 210, 218, 225.

<sup>3</sup> Among my Books, "New England Two Centuries Ago," 262.

meant little, however, that New York, in 1675, through her General Court, prohibited all trade at the plantations because of the traffic in rum. Nor was the effect lasting when Massachusetts Bay or Plymouth Colony set a fine or imposed so many months imprisonment on every pint sold.<sup>1</sup> Traders were greedy of gain, paid their fines and continued their traffic. Nor did the Indian cease to have a desire for "fire-water" because of a fine of ten shillings or a whipping for drunkenness.<sup>2</sup>

#### CRITICISMS ON THE TRADING POLICY.

Sir William Johnson regarded the English trading system as a failure. In his report for 1761 he compares it with that of the French.<sup>3</sup> Under the English, the profits induce the dregs of the people, discharged provincial soldiers, batteauxmen, to engage in the trade. "They are compelled to make use of low selfish agents, French or English as Factors who at the expense of honesty and sound policy, took care of themselves whatever became of their employers." He sets forth the manifest superiority of the French system, and makes suggestions for the future improvement of the English methods.<sup>4</sup>

#### TRADING-HOUSE SYSTEM.<sup>5</sup>

We shall now consider one of the institutions strongly commended by Superintendent Johnson and which was subjected to the test for over one hundred years. After a trial in the colonies, it passed on to its completed form under the government of the United States. Its final failure to meet the needs of the Indian trade did not come until the year 1822.

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<sup>1</sup> Province Laws 1693, 150; 1725, XL., Sec. V. Plymouth Col. Records, IX., Laws 1623-1682, 54, 184, 185, 256.

<sup>2</sup> N. Y. Col. Doc's, III., 242. Plymouth Col. Records, IX., 140, 209, 234.

<sup>3</sup> N. Y. Col. Doc's, VII., 956.

<sup>4</sup> *Ibid.*, 971.

<sup>5</sup> Published in the Magazine of American History, May, 1892.

The term trading house was in use as early as 1625. It was applied to a house erected on the Kennebec river by some traders from Plymouth.<sup>1</sup> As has been noted, trade in this colony was at that time carried on in common. Commodities such as "coats, shirts, ruggs, & blankets, biskett, pease, prunes &c.," were stored in this trading house in order to meet the trade which had previously been carried on with the Indians by fishermen. By an act of 1622 the Court of Boston ordained "that there shall be a trucking howse appoynted in every plantation, whither the Indians may resorte to trade, to avoide there comeing to seuall howses." But the term was not used to its full intent until the year 1694.

Massachusetts Bay Colony in that year, through her Governor, Council and representatives in General Court assembled, passed an act for regulating the Indian trade. This act contains a complete description of the trading house system. As it forms the basis for later acts, I shall consider its provisions somewhat at length. All trade with the Eastern Indians was to be carried on "at the charge of and with the publick stock in their majesties' treasury within this province and for the benefit and advantage of the same." Truck masters were provided for. They were to be appointed by the treasurer and the commissioner of impost. These managers of the trade were to have a stated salary and to take an oath that they would not engage in trade on their own account. Instructions regarding the trade were to proceed from the Governor and Council. From time to time, as required, the accounts were to be laid before the General Court. It was further provided that "no person or persons whatsoever, other than those to be imployed as aforesaid shall directly or indirectly truck, buy, sell, deal, or trade with any Indian or Indians under penalty of 50 pounds and forfeiture of goods."

The original stock was 500 pounds. Any gains in the

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<sup>1</sup> Mass. Hist. Colls., Ser. 4, III., 233.

trade were used for the support of the government. Upon the renewal of the act in 1699 it was provided that the original investment, with any gains, should be re-invested in the trade.<sup>1</sup> The reason for thus increasing the capital stock was to undersell the French. This was doubtless the chief cause for the early establishment of trading houses. French influence compelled a more extended trade by the colony. In the year 1725, 4000 pounds were given for the support of the trade at the different truck-houses.<sup>2</sup> The Indians were to buy the goods at wholesale prices and sell their furs at the Boston market rates.<sup>3</sup> Any agent who violated either of these provisions was, upon conviction, to be fined 100 pounds. Acts providing for trading houses were continued and renewed by this colony until and during the Revolutionary War.

The year 1753 is of especial note in an account of this trading house system. It marks the passing of the plan from Massachusetts to Pennsylvania. This, as we shall see later, was but one move towards its acceptance ultimately by the general government. Franklin was appointed agent among the Indians on the Ohio river. In the year above mentioned he made a treaty with them. They complained of their grievances at the hands of the private traders. Franklin was anxious to remove the causes for complaint. He wrote James Bowdoin, of Boston, for a copy of their "truckhouse" law and an account of its method of execution.<sup>4</sup> Bowdoin reviewed the act as it operated in Massachusetts. He dwelt especially on the two effects of the trading house system:<sup>5</sup> (1) By selling at wholesale rates the Eng-

<sup>1</sup> Province Laws, Mass. Bay Colony, 1699, I., XIII., Sec. 2.

<sup>2</sup> *Ibid.*, (1725), II., II., Sec. 1.

<sup>3</sup> *Ibid.*, (1725), II., II., Sec. 4. See acts 1731, 1733, 1737, 1742, 1753, 1761, 1764. See also Province Laws, 1782, p. 905.

<sup>4</sup> Franklin's Works, Bigelow's ed., II., 316.

<sup>5</sup> Franklin's Works, Bigelow's ed., II., 316. "Our truck houses are built in form of a square, each side one hundred and fifty feet or more, at each corner a flanker, in which is a couple of cannon;



lish will not only be enabled to undermine the French trade, but (2) will also remove the influence of the private trader.

Governor Dinwiddie, in 1757, refers to the passage of a similar trading house act in Virginia. The Assembly voted 5000 pounds to begin the trade. Goods were sold at first cost. The Governor urged the reasons already cited for the continuance of the act and commended its use by all the colonies.<sup>1</sup> The trustees were directed in 1760 to sell the goods on account of Indian hostilities. In 1765, however, the act of 1757<sup>2</sup> was revived and amended.<sup>3</sup>

It is of interest to note that South Carolina, as early as 1716, used this method of trade.<sup>4</sup> Her commissioners formed a closer corporation than the traders of any other colony. Their seal of corporate powers made them subject to trial before any court. There were three houses established. The act was passed for the period of two years,<sup>5</sup> but was renewed.

As the connection of the trial of this system of trade by the colonies and by the United States is so close, we shall consider its workings under the latter government. Trading houses during and after Revolutionary times were agencies against English influences as they had been against the French previous to this time. We have noted Franklin's interest in trading posts in 1753. Two years earlier, in a letter considering the "gaining and preserving the friendship of the Indians," he showed some knowledge of the plan. He said: "Publick trading houses would certainly have a good effect towards regulating the private trade, and preventing the impositions of the private traders, and there-

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three sides of the square are built upon to accommodate the garrison and for storehouses, the whole being surrounded by palisades."

<sup>1</sup> Dinwiddie Papers, II., 640, 642, 692.

<sup>2</sup> Henning, Statutes at Large, VII., 116, 117. <sup>3</sup> *Ibid.*, VIII., 114.

<sup>4</sup> Statutes of South Carolina, II., 1682 to 1716, pp. 677-680.

<sup>5</sup> See acts of 1717, 1718, 1721, 1722, 1725, 1726.

fore such should be established in suitable places all along the frontiers."<sup>1</sup>

In 1776 Congress accepted the report of the committee of which Franklin was a member and voted 140,000 pounds sterling to be expended in goods for this trade.<sup>2</sup> It was to be under the control of congressional commissioners.<sup>3</sup>

Washington furthered this plan made so prominent through Franklin's influence. In each of his annual addresses he urged upon Congress the necessity for the safe establishment of such a system. In his fifth annual address of December 3, 1793, he said: "Next to a rigorous execution of justice on the violators of peace, the establishment of commerce with the Indian nations, on behalf of the United States, is most likely to conciliate their attachment. But it ought to be conducted without fraud, without extortion, with constant and plentiful supplies, with a ready market for the commodities of the Indians, and a stated price for what they give in payment and receive in exchange. Individuals will not pursue such a traffic unless they be allured by the hope of profit; but it will be enough for the United States to be reimbursed only."

After the plan was commended by the Congresses of 1794 and 1795, in the latter year an act, embodying Washington's suggestions, was passed. It was to remain in force two years. The President of the United States was to have the privilege of establishing trading houses at such posts and places on the western and southern frontier as he should deem necessary for the carrying on of a liberal trade with the Indians. To meet this end \$150,000 were appropriated.<sup>4</sup> The friends of this act do not seem to have regarded its strength as a civilizing agent, but wished by it to accomplish two objects:<sup>5</sup> one of which was the "securing of

<sup>1</sup> Franklin's Works, Bigelow's ed., II., 221.

<sup>2</sup> Journals of Congress, 1775, pp. 162, 168, 247.

<sup>3</sup> *Ibid.*, 1776, p. 41.

American State Papers, Ind. Affs., I., 583.

<sup>5</sup> Annals of Congress, IV., 1273.

the friendship of the Indians by supplying their wants," and the other the "supplanting of the British trader in his influence over the Indian."

We learn from the report of the Secretary of War for 1795 that two trading houses were established as an experiment among the Southern tribes. The tribes at the North had not yet come into friendly intercourse. One of these Southern posts was located among the Creeks at Colerain, on the river St. Mary's, chosen because of ease of access both by land and water. The other was located for the purpose of supplying the Cherokees and Chickasaws, and was located at Tellico Block House, in Cherokee territory.<sup>1</sup>

The Indians were made to understand that the trade now to be carried on among them, under the direction of the President of the United States, was entirely different from that heretofore pursued, that, namely, by individuals solely for their own profit.

The positions for the trading houses were to be chosen from the Indian possessions, but were not to become the property of the United States. The houses were to revert to the original owners when no longer used for a trading or a military post. Trade was to be regulated by the President. Every article was to have its stipulated value. Weights and measures were to be introduced in order that the hunters might bring their peltries, at once know their value and receive satisfactory exchange. Persons were to be appointed by the President to obtain goods from the manufacturers at the cheapest rates, carry them to the trading houses and there dispose of them at cost price plus the charge of carriage. Where licensed traders procured these goods from factors they were to be allowed only a stipulated amount for wages, and the prices at which they must sell were to be posted in every village.

In 1801 there had been but \$90,150 of the original appropriation drawn from the treasury. There was no ade-

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<sup>1</sup> American State Papers, V., 583, 584.

quate report of the trade up to this time, and while there may have been some advantages in the system in so far as it attached the natives more closely to the government and tended to remove the animosities excited by private traders, these good results were not of sufficient importance to warrant the continuance of the enterprise. It was, however, thought expedient by Congress to extend the time, using the same capital.

On the renewal of the act, Jefferson recommended as one of the chief agents for reducing the savages to civilization that the trading houses be multiplied in order that those things might be placed within their reach which would contribute more to their domestic welfare than the possession of "large but uncultivated wilds."

In his third annual message, President Jefferson spoke favorably of the system which would furnish necessities in exchange for commodities at such moderated prices as would leave no gain, but cover losses. He said it would have a conciliatory and useful effect upon the Indians; it would "best secure their peace and good will." The message for 1804 contains the same unquestioned approval of the plan: "Instead, therefore, of an augmentation of military force proportional to our extension of frontier, I propose a moderate enlargement of the capital employed in that commerce as a more effectual, economical and humane instrument for preserving peace and good neighborhood with them." The message for 1805 refers in a most hopeful manner to the satisfaction manifested by the Indians of the Missouri and the Mississippi valleys, with their governmental relations, and of their desire to cultivate peace with the United States.

The time originally proposed had now expired, but there was no thought of a discontinuance of the trading system. At the close of the year 1811 there had been appropriated \$300,000 exclusive of officers' salaries, amounting to some \$35,000 annually. Ten factories had been established upon the following sites: Fort Hawkins, Georgia; Chickasaw

Bluffs, Mississippi Territory; Fort St. Stephens on the Mobile river; Ft. Osage on the Missouri river; Ft. Madison on the upper Mississippi river; Nachitoches on Red river; Ft. Wayne on the Miami river; Chicago, then in Indiana Territory; and Michilmackinac on Lake Huron.<sup>1</sup> It was estimated that the amount of money gained in these "factories" from 1807 to 1811 was \$14,171. The Southern factories, because of the greater difficulty of communication with the coast and thus with European markets, reported losses.

That there were many advantages in this system seems sufficiently attested, not alone from the unqualified statements of presidents and other United States officials, but from actual continuation of trade relations for twenty-six years during the times of governmental weakness and financial strain. Among the more noteworthy merits cited were: (1) The superior trade advantages which the system held out to the impoverished race for whose benefits it was established; (2) The ease of access, by such methods, into the confidence of the Indians, who thus by slow degrees learned those moral and intellectual lessons so necessary for the saving of a dependent people.

At the beginning of the year 1812, when the whole plan seemed most satisfactory, signs of failure were apparent. These became more pronounced through the succeeding years up to the final discontinuance of the policy. The causes for this peculiar failure are numerous<sup>2</sup> and show in a measure the general weakness of our government at that period. One of the chief of these was the greater influence over the Indian always held by the English. Their treatment, as a government, of the Indian was thought to be almost perfect. No person was eligible for the place of agent under the English government unless he was able to speak some one of the Indian languages. An agent thus

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<sup>1</sup> American State Papers, V., 768.

<sup>2</sup> Amer. State Papers, VI., Ind. Affs., I., 684. Abbr. Deb., VII., 1780.

equipped might easily learn the peculiar manners and customs of the tribe and soon become influential with the different "head-men" with whom he dealt. Americans who were appointed to important positions were, many of them, men who had not "seen an Indian, much less did they know how to conciliate him in trade." The English gave all officers of the Indian Department military brevet rank and caused them to wear military insignia. This gradation obviated many difficulties by making uniform the various measures. Flashy clothes and gilded trappings had no little influence on the mind of the natives. The highest British officials thought it not derogatory to their interests to smoke the pipe or converse with the chiefs. Thus the English learned to rid themselves of the evil influences of designing interpreters.

Trading houses were established in conjunction with military posts. The relative importance of the officials had not been clearly defined and much embarrassment arose from conflicting orders. The superintendents were too often uninterested in their duties and turned the official work over to less competent persons. The English were in the habit of making many presents to the Indians. When they came to the understanding that the goods distributed throughout the factories were not to be given them, they lost confidence in a "Father" whom they thought so poor that he was compelled to descend to the position of a private trader.

The general government attempted to use the same methods as those employed by the English. Either the amounts voted were insufficient or there was so great delay in transferring even these scanty means to the agents that they inevitably lost control of the chiefs. A manuscript letter from the agent at Fort Michilmackinac refers to the presents of the period: "From the issue last July to twenty-five chiefs I am persuaded that no good can possibly result from this method, and it is productive of much heartburning and discontent. Those who receive their

small allowance are scarcely satisfied either with the agent or the government, and those who can receive nothing openly profess themselves dissatisfied with both.” The English government, on the other hand, is reported to have spent \$200,000 annually in presents at the two posts Malden and Pennaton, among the Chippewas of Lakes Superior, Huron and Michigan, and the Ottawas, Menomonees and Winnebagoes.

The goods used in the trading houses were inferior to those of the traders and less fitted for the trade. A committee of investigation reported a large portion of the stock to consist of “men’s and women’s coarse and fine shoes, worsted and cotton hose, tea, glauber’s salts, alum, anti-bilious pills, green silk, fancy ribands, and morocco slippers, without which collection the good health or good appearance of the Indian seems not to have been assured.”<sup>2</sup>

It was explicitly provided that no white man should be allowed to purchase stores from the factors. Private traders were continuously equipped from them. The factors even sold, on application, to the English traders. Credit was prohibited at the trading houses. As the Indian could not pay his debts until the close of the hunting season, he was unable to obtain goods. Private traders accompanied Indians to hunting grounds where barter might be most thoroughly resorted to. Express provision was also made that there were to be no profits in the trade carried on by the government. Goods were sold at rates sometimes forty per cent. in advance of the original cost.

Among the instructions sent out to the various factors was one which absolutely forbade the carrying on of any “trade, commerce, or barter,” on behalf of the factors themselves. They were bonded to the government, with satisfactory security, in the sum of \$10,000, that they would perform all their duties faithfully and return accurate accounts. Many were supposed to have grown rich in the service.

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<sup>1</sup> Boyd MSS., III. In Wisconsin State Historical Library.

<sup>2</sup> American State Papers, VI., 329.

After a consideration of the many abuses and manifest weaknesses of the system, Congress, in 1822, abandoned the trading houses. Heavy losses were reported the last few years of the business. In fact, there was an annual loss of \$40,000 to the government.

#### INDIAN SLAVERY.

There never was a time in the world's history when slavery was not somewhere recognized and enforced by the laws of society. In the beginnings of America, as elsewhere, the economic profits of slavery seemed to concern the mind of the average colonist rather than the rights of his fellow-men. The Spaniard came to the New World with his seemingly innate idea that all things belonged to the conqueror. Natives were everywhere enslaved. They were early considered a part of the "*repartimiento* system." In the first grants of land, however, there is no mention of the Indian.<sup>1</sup> Under the second form of *repartimiento*, that of 1497, feudal ideas become more notable. Land was granted "in the Indies," the grant including a certain number of natives to till the soil.<sup>2</sup> A few years later the *encomiendo* came into usage.<sup>3</sup> By this the persons to whom Indians were assigned had the right to exact tribute from them. Payments were necessarily largely made through day's labor. Bobadilla, the successor of Columbus, "seems to have gone further and to have permitted the Spaniards to treat their Indians as a labor gang." They might thus be taken to work anywhere and without restriction. The hardships of the native under this chain-gang system need not be related.

We find no evidence of such an intolerable condition of Indian slavery among the English colonists. The Indian was considered from the first as an integral part of the slave system of which the negro formed the chief factor. Invol-

<sup>1</sup> Help's Spanish Conquest, I., 152.

<sup>2</sup> *Ibid.*, I., 164.

<sup>3</sup> *Ibid.*, III., 117.



untary servitude of Indians in the several colonies originated under a law not promulgated by legislation, but it was based on a once prevailing law of nations. By unquestioned ancient usage, prisoners of war might be disposed of as the captor willed. The selling of prisoners into slavery was, historically speaking, an advance upon the original custom of sacrificing the lives of male captives.

Positive legislation on the subject of Indian slavery early appears in Massachusetts.<sup>1</sup> Of the ninety-eight articles of which the "Body of Liberties" is composed, two have especial reference to slaves. These form one of the first enactments establishing slavery in New England. One article declares: "There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. . . . This exempts none from servitude who shall be Judged thereto by Authoritie." This may be regarded as a restrictive clause. There had been slaves in the colony and the institution of slavery was to continue, although confined to three classes of persons. Slavery does not seem to have been sanctioned for pecuniary reasons, but rather as a measure of defense. By far the largest number of slaves belonged to the first of the three classes, that is, captives taken in war.

"Man-stealing" was made a criminal offense. It is argued that children born in the colony were not slaves; upon this point, however, there are wide differences of opinion.<sup>2</sup> The dread and alarm through the Pequod attacks caused the colonists to take captives when possible. Governor Winthrop, reporting in 1637 an attack and defeat of this tribe, says: "The Prisoners were divided, some of those of ye river and the rest to us. Of these we sent ye

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<sup>1</sup>Mass. Hist. Soc'y Colls., Ser. 3, VIII., 231. None of the laws of this colony "were printed until 1648." Palfrey, *History New England*, II., 22.

<sup>2</sup>See Moore, *History of Slavery in Mass.*, 15-28. The discussion pertains chiefly to negroes.

male children to Bermuda & ye women & maid children are disposed aboute in ye townes."

A letter of 1645 to Governor Winthrop discloses the Puritan inner consciousness on the subject of slavery. It suggests another method of dealing with the Indian captives: "A warr with the Narragansett is verie considerable to this plantation, ffor I doubt whither it be not synne in us, having power in our hands, to suffer them to maynteyne the worship of the devill which their powwayes often doe; <sup>2</sup>lie, If upon a just warre the Lord should deliver them into our hands, wee might easily have men, women & children enough to exchange for Moores, which wil be more gaynefull pilladge for us than we conceive, for I doe not see how wee can thrive untill wee gett into a stock of slaves sufficient to doe all our business, for our children's children will hardly see this great Continent filled with people, soe that our servants will still desire freedome to plant for themselves, & not stay but for verie great wages. And I suppose you know verie well how wee shall maynteyne 20 Moores cheaper than one Englishe servant."

A similar view with regard to the desirability of negroes and the propriety of an exchange of Indians for them was maintained by the United Colonies. In the early years of this confederacy of 1643 it was agreed that Indians were no longer to be kept in prison, because of the cost of maintenance. The delinquents, or their tribe, might make reparation. If this were not done, then the magistrates were to "Deliuer up the Indians seased to the party or parties in damaged, either to serue or to be shipped out & exchanged for negroes as the cause will iustly beare."

One of the first fugitive slave laws ever enacted in North America was that passed by the United Colonies in 1672.<sup>2</sup> It provided for the return to his master of any escaped servant. Such servant was to be given over by any other

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<sup>1</sup> Plymouth Records, IX., 71.

<sup>2</sup> Plymouth Records, X., 348. Mass. Col. Records, IV., Part II., 473.

colony to any person who claimed the services of the escaped party, provided he claimed the right of capture through a magistrate's certificate. This applied also to magistrates into whose jurisdiction the fugitive might come. Upon due proof of the right of search, any magistrate was to "graunt such a warrant as the case will beare for the apprehending any such person; and the deliuering of him or it shal be graunted, hee paying the charge thereof."

her into the hand of the pursuer and if heale be required

During King Philip's War the number of prisoners was greatly increased. At a meeting of the Plymouth Council in 1675 to consider the disposition of over one hundred captives, they concluded, "vpon seriouse and deliberate consideration and agitation consarning them," to sell the greater number "unto servitude." It is further provided in 1676 that any who held Indian male captives beyond the time stipulated were to forfeit them to the colony.<sup>2</sup> A fiscal report of the United Colonies for 1678 includes the sale of 188 captives, for which 397.13 pounds were received.<sup>3</sup> The account of an estate at Salem in 1685 exhibits Indians among the chattels. Besides the specie, silverware, napkins, etc., there were an "Indian maid and man-servant, they fulfillingge there Respective Indentures."<sup>4</sup>

It would appear that the freedom of the captives was sometimes bought. They were also freed on the attainment of a certain age after a term of service. The Plymouth Court ordered the release of a certain Indian woman and her husband upon the payment by her brothers of the sum of six pounds in New England silver money.<sup>5</sup> The order further provides in the case of a "younge Indian" that he shall remain with his master until he reaches the age of twenty-four and "then to be released for euer."

Conditional servitude, under indenture or covenant, had

<sup>1</sup> Plymouth Records, V., 173, 174.

<sup>2</sup> *Ibid.*, XI., 242.

<sup>3</sup> *Ibid.*, X., 401.

<sup>4</sup> Weeden, *Economic Hist. N. Eng.*, I., 292.

<sup>5</sup> Plymouth Records, VI., 15.

from the first existed in Virginia.<sup>1</sup> White prisoners, debtors and homeless children had at times been sent into the colony. These were sold. Their status differed from that of mere slaves chiefly in the term of their bondage. While white and negro slavery was allowable in the colony, there is little evidence of the actual enslavement of the Indian in Virginia until the year 1657. In this year there was an act passed to prohibit the stealing of Indian children by Indians who had been hired by the English. All such stolen children were to be returned to their tribes within ten days and five hundred pounds of tobacco were to be paid the informer by the offending party.<sup>2</sup>

Troubles arose from time to time on account of the encroachment of the whites on the Indian lands. It became necessary to protect the white settlers. In 1660, after a complaint of damages, the plaintiff was given the right, provided satisfaction was not made, to sell as many Indians "out of the country" as the Court might prescribe.<sup>3</sup> It is of interest to note that no Indian had a right to sell another Indian. All such cases were to be freed. Those Indians who spoke the English language and "desired baptism," were also to be given their freedom.<sup>4</sup>

There is a close distinction regarding slavery in an act of 1670. Any servant imported by ship into the colony was to be a slave for life. A servant coming by land, if young, was to serve until he reached the age of thirty and was then free. A man or woman thus imported was freed at the expiration of twelve years.<sup>5</sup> The term servant was later made applicable contrary to the original intent, to Negroes. In consequence, the act was repealed in 1682. Henceforth all Indians sold as slaves were to be so regarded. This extended likewise to those Indians purchased from other Indians.<sup>6</sup>

Bacon's Laws provided that all Indians taken in "Warr be held and accounted slaves dureing life." The com-

<sup>1</sup> Bancroft, I., 125-127.

<sup>2</sup> Henning, *Statutes at Large*, I., 482.

<sup>3</sup> *Ibid.*, II., 15.

<sup>4</sup> *Ibid.*, 155.

<sup>5</sup> *Ibid.*, 283.

<sup>6</sup> *Ibid.*, 491.

mander, in the time of war, was to make such a division of the captives as he thought best.<sup>1</sup>

In 1691, all former laws restricting trade with the Indians were repealed. Indians might then be traded with anywhere and at all times.<sup>2</sup> Referring to this old law, the Supreme Court of Virginia decided in 1808: "That no native American Indian brought into Virginia since the year 1691 could, under any circumstances, be lawfully made a slave."<sup>3</sup> Although the law of 1691 implied that the Indian could not be a slave for the reason that he had the right to trade, still it remained inoperative for over one hundred years.

After the treaty of Albany in 1722, no Virginia Indians were to cross the Potomac river without license, nor were any of the Five Nations or their allies to go beyond this boundary line. Any offenders were to be punished by death or transportation.<sup>4</sup> Many of the more important enactments regarding slavery in Virginia pertain indiscriminately to all classes of slaves, whether Negroes, Indians, or Mulattoes.<sup>5</sup>

Indian slavery did not exist to any extent in New York colony, although here also it is recognized as a part of a general system of slavery. There are but few references to Indian slaves as distinguished from Negroes and Mulattoes. One of the first cases occurred in 1644, in a report to the West India Company for that year:<sup>6</sup> "The captured Indians who might have been of considerable use to us as guides, have been given to the soldiers as presents and allowed to go to Holland; the others have been sent off to the Bermudas as a present to the English Governor."

Some trouble arose at times in New York because of the

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<sup>1</sup> Hening, *Statutes at Large*, II., 346, 404.

<sup>2</sup> *Ibid.*, III., 69.

<sup>3</sup> *Pallas vs. Hill*, 2 Hening and Mumford Reports, 149.

<sup>4</sup> *Virginia Laws, 1722*, 8th George I. Byrd MSS., II., 258.

<sup>5</sup> See Hening, *Statutes at Large*, II., 491, III., 140, 402, 403. Also *Virginia Laws, 1723*, 9th George I., IV., Sec. 23.

<sup>6</sup> N. Y. Col. Doc's, I., 210.

sale of Indian children who had been given into the hands of the English that they might be "instructed."<sup>1</sup> As late as the year 1749, Colonel Johnson wrote Governor Clinton of this usage. He says: "I am very glad your excellency has given orders to have the Indian children returned, who are kept by the Traders as pawns or pledges as they call it, but rather stolen from them, as the parents came at the appointed time to redeem them but they sent them away before hand, and as they were children of our Friends and allies and if they are not returned next spring it will confirm what the French told the Six Nations viz. that we looked upon them as our slaves or negroes."<sup>2</sup>

Connecticut had some cases of Indian slavery. The General Court, in 1676, ordered that all Indians who surrendered themselves within a stated time should not be sold "out of the country for slaves."<sup>3</sup> Their freedom was granted them after ten years of faithful service. A law in Connecticut in 1715, while prohibiting the importation of Tuscaroras,<sup>4</sup> forbade all importations of Indians.

The general conclusions may be stated that, while there were cases of enslavement of the Indian in the colonies, such practices were not general. Prisoners were captured in war, and the colonists, fearing to keep them, sold them in foreign countries. Negro slavery was everywhere more profitable. There was always a fear of the effect of Indian slavery on the tribes. This became one of the chief arguments against a traffic in Indian captives by the opponents of the system.<sup>5</sup> It was found necessary to restrict slavery in order that the best possible influence might be exerted on the natives through education and religion.

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<sup>1</sup> N. Y. Col. Doc's, V., 432.

<sup>2</sup> *Ibid.*, VI., 546.

<sup>3</sup> Conn. Col. Records, 1665-1677, 297, 482.

<sup>4</sup> *Ibid.*, 1715, 534.

<sup>5</sup> Plymouth Records, X., 451, 452.

## EARLY PROVISIONS FOR INDIAN EDUCATION.

It is noteworthy that, from the very earliest English settlements, attempts were made by the colonists to educate the Indians. These efforts took the ambitious form of schools and even colleges where the Indians were to have the same opportunities as the whites.

As early as the year 1619 the King had issued letters to the several bishops of the kingdom and set forth the value of such missionary work as follows: "As well for ye enlarging of our Dominions, as for the propagation of ye Gospel amongst Infidells, wherein there is good progresse made and hope of further increase; so as the undertakers of that plantation are now on hand with the erecting of some Churches and Schools for ye education of ye Children of those Barbarians, wch cannot but be to them a very great charge, and aboue the expence wch for ye civill plantation doth come to them. In wch wee doubt not but that you and all others who wish well to the encrease of the Christian Religion will be willing to give all assistance and furtherance you may, and therein to make experience of the zeale and deuotion of our well minded subjects especially those of ye Clergie."<sup>1</sup>

The sum of 1500 pounds was raised in this way.<sup>2</sup> In the same year, 1619, Sir Edwin Sandys, treasurer of the Company, urged the plan of founding a college in Virginia for the education of the English and Indian youth in common.<sup>3</sup> A committee was appointed, and it was agreed that 10,000 acres of land should be set aside for a "University at Henrico" near Richmond. One hundred men were to be sent to live on these lands and to cultivate them and receive as a compensation one-half of the profits. The other half was to be used for building, salaries of instructors, and maintenance of the pupils. A superintendent was sent from

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<sup>1</sup>Quoted in Perry, *Hist. of American Colonial Church*, 543.

<sup>2</sup>Stith, *History of Va.*, 171.

<sup>3</sup>*Ibid.*, 163

England. He was to have 300 acres set aside for his needs and to be assigned ten men to care for the tract. Among the other gifts was one of 550 pounds sterling for the education of Indian youth in English and in the Christian religion.

Two years later, 1621, 125 pounds were contributed for the purpose of establishing a church or a free school in Virginia. The greater amount of this sum was given by the East India Company.<sup>1</sup> It was determined to build a school at Charles City, to be known as the East India School. One thousand acres of land were set aside for the maintenance of the master and usher. The school planned was to rank as a seminary. The pupils were to pass when proficient to the college at Henrico. Carpenters were sent over the next year to erect buildings.

In 1622 the giver of the 550 pounds mentioned, proposed that some of the Indian boys be sent to England for their education. He desired that the sum given be used for that purpose, and promised to make the amount 1000 pounds as soon as eight Indian boys were brought to London. If the overseers did not approve, however, he further recommended that the original amount be expended upon a free school in Southhampton Hundred, where the English and the Indians were to be taught and brought up together. After "careful consultation," it was agreed to use this sum, together with a "far greater sum out of the Society's purse," to set up iron works where eighty men were to be employed.<sup>2</sup> The profits were ordered in a "ratable" proportion, to be employed in educating thirty Indian children.

These plans which promised so much were almost given up on account of the massacre of 1622. A bequest of 100 pounds was made that year for Indian education. The college lands were abandoned and a site was chosen lower down the river. There were no further public attempts for Indian education until the bequest was received which firmly established William and Mary College.

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<sup>1</sup> Stith, *History of Va.*, 204.

<sup>2</sup> *Ibid.*, 215.



Efforts were made in the meantime to keep alive the idea of a college. In 1660 there was a renewed attempt to found an institution of learning.<sup>1</sup> Again in 1688 and 1689 some wealthy Virginians and English merchants subscribed 2500 pounds sterling to establish a college.<sup>2</sup> Governor Nicholson sent commissary Blair to England in 1691 to secure a college charter.<sup>3</sup> The following letter from the commissioner gives the method by which the attention of the Crown was called to the institution.<sup>4</sup> "It was Nov<sup>r</sup> 12th, in the Council Chamber before the council sat. I was introduced by the Archbishop of Canterbury . . . . I kneeled down & said these words: please your majesty here is an humble supplication from the Government of Virginia for your Majesty's Charter to erect a free school & college for the education of their youth & so I delivered it into their hand. He answered, 'Sir I am glad that that colony is upon so good a design & I will promote it to the best of my power.'"

The charter was granted in 1693. It does not contain a definite provision for the education of Indians. Christian ministers were to be educated in order that the gospel might be sent to the "Western Indians."<sup>5</sup>

Previous to the formal organization under the charter, at which time the name of William and Mary College was first used, the King and Queen showed considerable interest in the project. In 1691 it was agreed by them that the college should be aided through the grants of (1) 1985 pounds sterling to be raised out of the quit rents of the colony; (2) one penny a pound on all tobacco exported from Virginia and Maryland; (3) 20,000 acres of land on York river.<sup>6</sup>

Through a provision of the executors of the estate of the

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<sup>1</sup> Henning's Statutes at Large, II., 25.

<sup>2</sup> Perry, Hist. American Col. Church, Va., 545.

<sup>3</sup> *Ibid.*, 3.

<sup>4</sup> *Ibid.*, 6.

<sup>5</sup> History of William and Mary College, 1660-1874, 4.

<sup>6</sup> Perry, American Col. Church, 545. History of William and Mary College, 25.

Hon. Robert Boyle in the same year, Indian children were admitted to educational privileges. His will provided that the residue of the estate, after debts and legacies were paid, was to be used "for such charitable and pious uses" as the executors might think best. The latter agreed to purchase land to the amount of 5400 pounds sterling. The annual rents thereof were to be used for the maintenance and education of Indian pupils who should attend William and Mary College.

There was made an annual reservation of 90 pounds sterling, to be used to benefit the Indians of New England. For seven years thereafter Harvard University received this bequest. The Bishop of London then arranged to have this sum also pass to the College in Virginia for the assistance of Indian pupils.

Six masters were to be employed, and the sixth was to have charge of all Indians who should attend. The course of study arranged for them consisted of such work as would best fit them to become teachers and preachers among their own tribes. It was necessary of course to begin with the rudiments of knowledge. The Indians who were first received into the College were bought of other Indians who had held them as prisoners of war. Large portions of the amount given for Indian education were used first to buy the freedom of the Indian children. Governor Spotswood in a letter to the Council of Trade in 1711 proposed another plan. His method, which had not been favored by the authorities of the college, proposed that the children of the tributary Indians be "brought up" under the College influences. In pursuance of this idea, he urged upon the Council the necessity for providing a large fund for Indian education. He said the amount then available would be wholly inadequate for the maintenance of so large a body as would attend.<sup>1</sup> The governor, in a later letter, refers to the coming of hostages from all the tributary Indians. By

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<sup>1</sup> Spotswood Letters, I., 121, 122.

sending their children the Indians escaped the payment of the tribute.

The House of Burgesses were indifferent to Indian education. A bill prepared by Governor Spotswood which proposed some slight assistance by the state to support these hostages was dismissed without discussion.<sup>1</sup> The following year, 1712, he asked aid of the Bishop of London in order to carry out the same plan.<sup>2</sup> By this letter it appears that there were twenty Indians in attendance at the College. They were pleased with the change of their condition, and their parents expressed satisfaction with the care given their children. In this letter the governor also urges a school-house and a "master" for each of the chief Indian towns.

Between 1700 and 1776, from eight to ten Indians were educated annually at the College. Some of them came a distance of four hundred miles.

While the primary idea in the Indian education in all the colonies was the inculcation of Christian principles, this religious object is most conspicuous in New England. Through the efforts of Edward Winslow, agent for the United Colonies, Parliament, in 1649, passed an act incorporating the "Society for propagating the Gospel in New England."<sup>3</sup> This society numbering sixteen persons, a president, a treasurer and fourteen assistants, was authorized to purchase real estate not to exceed 2000 pounds sterling in value per annum. Any money bestowed upon the Society was under the control of the Commissioners of the United Colonies or of such persons as they might select. These agents were privileged to use such gifts either for the spread of the gospel or to maintain "schools and nurseries of learning for the education of the children of the natives."

Harvard College received its charter from the commis-

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<sup>1</sup> Spotswood Letters, I., 135.

<sup>2</sup> *Ibid.*, 174.

<sup>3</sup> Mass. Hist. Soc'y Colls., I., 212. Neal, Hist. New Eng., I., Chap. VI.

sioners in 1650. The following article of incorporation precedes the body of the charter:<sup>1</sup> "For all accommodations of buildings & all other nessessary provisions that may conduce to the education of ye English and Indian youth of this country in knowledge & godlynes, it is therefore ordered & enacted by this Courte & the authority thereof—" In compliance with the terms of this article the Massachusetts commissioners were directed to build, by means of certain funds sent from England, "one Intyre Rome att the College for the Conveniencye of Indian youthes to bee trained vp there according to the advise Received this yeare from the Corporation in England."<sup>2</sup> The original 120 pounds set aside for this purpose seems to have been increased, and a brick building, the first erected on Harvard grounds, was built.

Twenty Indian pupils were to be cared for in this "Indian College." A complete academic course was provided for them, after they had been trained in one of the preparatory schools. Very liberal were these earliest provisions for Indian education when we take into consideration the needs of the colonists themselves. The report of the commissioners for 1656 shows an expenditure of 1722 pounds sterling. A large part of this sum was used for teachers' salaries and to support the Indian children.<sup>3</sup> The report for 1658 indicates an outlay of 520 pounds,<sup>4</sup> and that of 1659,<sup>5</sup> "five hundred ninety-four pounds, largely for Indian education."<sup>6</sup>

The one conspicuous illustration of the untiring zeal manifested in civilizing the Indians in New England is presented in the person of John Eliot.<sup>7</sup> A graduate of Cambridge, he began his missionary efforts in 1746. His prodigious labors are referred to by all the historians of the

<sup>1</sup> Mass. Col. Records, III., 195.

<sup>2</sup> Plymouth Col. Records, X., 107.

<sup>3</sup> *Ibid.*, 166.

<sup>4</sup> *Ibid.*, 205.

<sup>5</sup> *Ibid.*, 245, 246.

<sup>6</sup> For further reports see pp. 277, 278, 279, 317, 356.

<sup>7</sup> Mass. Hist. Soc'y Coll's, I., 172. The number of these Indians in 1674 was estimated at 4000.

period. The "Praying Indians" were organized by him under the protection of the English towns. For their benefit he translated the Bible, a grammar, primer, and an Indian catechism. He organized schools where Indian children were instructed in English, Latin and Greek.

By an order of the General Court of Connecticut in 1727, any person in the colony who had an Indian servant was directed to teach such servant to read English and to instruct him in the principles of the Christian faith.<sup>1</sup> The selectmen were ordered to make diligent inquiry with respect to the application of this act. Any master who neglected to perform this duty was fined 40 shillings. The money thus collected was used to support the school in the town where the fine was incurred.

It is noteworthy that Dartmouth College took its start as Moor's Charity School for Indians. One Sampson Occum, a christianized Indian, through his preaching in England, raised money sufficient to begin this work in behalf of his people. From a report on this college at Philadelphia we learn that in 1756 Indians had been admitted.<sup>2</sup>

There is little said in the colonial records with regard to the success or failure of the attempts to educate the Indian. Reports from the northern colonies show more satisfactory results than do those from Virginia. In their letter to the corporation in England, of September 7, 1659, the commissioners write as follows:<sup>3</sup> "There are five Indian youthes att Cambridge in the lattin schoole, whose diligence and proficiency in their studdies doth much encourage us to hope that God is fiting them and preparing them for good instruments in this great and desirable worke; wee have good testimony from those that are prudent and pious, that they are diligent in theire studdies and civell in theire carriage; and from the President of the Colledge; wee had this testimony in a letter directed to us the 23 of August

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<sup>1</sup> Conn. Col. Records, VII., 102.

<sup>2</sup> Penna. Archives, 1756.

<sup>3</sup> Plymouth Col. Records, X., 217.

1659 in these words: the Indians in Mr. Corletts schoole were examined oppenly by myselfe att the publicke Commencement; concerning theire growth in the knowledge of the lattan tongue; and for theire time they gave good satisfaction to myselfe and also to the honored and Reverent Overseers."

A letter of 1729 gives an idea of the progress of Indian education in Virginia. We select the following:<sup>1</sup> "Many children of our Neighboring Indians have been brought up in the College of William and Mary. They have been taught to read and write and have been carefully instructed in the Principles of the Christian Religion, til they came to be men. Yet after they return'd home, instead of civilizeing and converting the rest, they have immediately relapst into Infidelity and barbarism themselves. . . . Besides, as they unhappily forget all the good they learn and remember the Ill, they are apt to be more vicious and disorderly than the rest of their Countrymen." Governor Spotswood reported that the Indians held as hostages and sent to William and Mary College after their return to their people again "lapse into idolatry and barbarism."<sup>2</sup>

Many obstacles were encountered in the attempts to keep the Indian pupils long enough to complete the college or even the preparatory course. Indian superstition was one of the chief obstacles. Another difficulty was the natural indolence of the Indians. Dartmouth was early given up to the education of white pupils. There is but one Indian graduate on record at Harvard College. Many returned to their tribes before the completion of an educational course and rendered efficient service as teachers, guides, and carpenters.<sup>3</sup>

It was suggested even in Puritan days that the true way to aid the Indian was to go to him in his tribe and, by teaching

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<sup>1</sup> Byrd MSS., 1729, 74.

<sup>2</sup> History of William and Mary College, 43.

<sup>3</sup> Mass. Hist. Coll's, I., 172.

and good example, gradually lead him into the practical knowledge of better modes of living and of taking care of himself.

#### INDIAN SUPERINTENDENCE.

We find no general superintendence of the Indians in the various colonies prior to 1750, save that exercised by the governors with the advice and consent of the councils. The General Court of Massachusetts, however, allowed certain Indian villages to choose their own magistrates. These were to be approved by the Superior Court. This magistrate, together with an English magistrate, constituted a higher court, with jurisdiction like that of a County Court in England. Their control extended to civil and criminal cases, to lands set aside for the Indians, and to the maintenance and founding of schools. The question of home rulers, of continued recurrence in the English nation since its first crude attempts on behalf of the Indians, still remains unsettled. Such attempts have in the majority of instances been failures.

New York was the central colony. The influence of a policy adopted at Albany was tacitly accepted by the sister commonwealths. Sir William Johnson was appointed superintendent of Indian affairs.<sup>1</sup> He was well received by the Indians, and although he found a department which had been thoroughly disorganized under the rule of commissioners appointed by the governor, he was able to reduce the "chaos."<sup>2</sup> His services during his term of two years were disregarded, and commissioners again took control. General dissatisfaction was expressed until 1755 when Superintendent Johnson was permanently appointed.<sup>3</sup> This result was brought about through a meeting, in 1754, at Albany, of commissioners from six provinces.<sup>4</sup> From their proceedings we learn that each tribe was to have a resident agent, "who was to have no concern in the trade," and who

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<sup>1</sup> N. Y. Col. Doc's, VII., 19. <sup>2</sup> *Ibid.*, VIII., 23. <sup>3</sup> *Ibid.*, VII., 19.

<sup>4</sup> Doc. Hist. N. Y., II., 356.

was to communicate with the Superintendent regarding a particular district. The Superintendent was, in turn, subject to advice from the Crown. Trade with the Indians was to be "well regulated and made subservient to public interest more than to private gain." No purchases of land were to be valid unless made by authority from the Indians in their "Public Councils," and all complaints with regard to illegal holding of lands were to be heard and "injuries redressed."

Among the plans submitted to Superintendent Johnson as a partial Indian policy, that of Secretary Wraxall previously referred to<sup>1</sup> is especially noteworthy.<sup>2</sup> Still more interesting is it, in that many of the provisions were utilized by the later English government, and traces may be seen in our present Indian policy. It was to be constituted a distinct service. A fixed fund was to be used for its support. There were to be two Superintendents for Indian affairs,<sup>3</sup> "persons of approved abilities, known integrity, and men agreeable to the Indians." One of the superintendents was to reside near the territory of the Iroquois, the other in South Carolina, from which positions they might have general supervision of the separate divisions. Superintendents were not to engage in trade. They were to hold all public meetings, issue presents, appoint interpreters and agents, and execute all laws regarding the Indian service.

#### ENGLISH RELATIONS FROM 1763 TO 1775.

The effect of the French and Indian War was to cause a reorganization of the departments for diplomatic intercourse with the Indians on a wider basis. A superintendent was appointed for the Northern Colonies and one for the

<sup>1</sup> See p. 30.

<sup>2</sup> N. Y. Col. Doc's, VII., 26.

<sup>3</sup> See American State Papers, V., 14, for congressional ordinance of August 7, 1786, which institutes two departments with the Ohio river as the boundary line. This was changed through the influence of John C. Calhoun, Secretary of War, 1818; Indian Superintendent to be under control of Secretary of War. American State Papers, VI., 182.



Southern. Their duties were to make all treaties between the tribes and the crown; see that their provisions were fully observed; prevent all wars between tribes that were allies of the king; prosecute encroachments upon Indian territory, and receive all lands that might be bought or surrendered. The plan, although it promised well, did not give satisfactory results. Superintendent Johnson commenting on it said: "The very different forms of government, interests, politics, disputes between the branches of Legislatures, defeat the hopes of a cordial union and render all hopes derived from scattered numbers very precarious if not wholly abortive."

Other causes of failure, reported by Superintendent Johnson, were:<sup>1</sup> (1) An unwillingness on the part of the colonial Assemblies to grant a sufficient sum for the conduct of Indian affairs within their limits; (2) Individuals were so engrossed in their own affairs as to care but little for the general weal, hence Indian wars; (3) The inherent defects in the laws applicable to the Indian. These laws had been in force since the landing of the first colonists, and because of different interpretations by the various colonies were no longer of much effect.

Had this warning by a competent authority been heeded, or had the weaknesses of the system he described been regarded, one of the prime causes for dispute between the central and state governments would have been removed. As it was, New York,<sup>2</sup> under the articles of confederation, seized the administration of Indian affairs as it slipped from the hands of the King's officers. North Carolina<sup>3</sup> extended her authority over the Cherokees within her limits. Georgia<sup>4</sup> did not cease to regard the Indians as her wards, notwithstanding the federal government thought them independent sovereign nations.

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<sup>1</sup> N. Y. Col. Doc's, VII., 971, 972.

<sup>2</sup> Journal of N. Y. Provincial Congress, 23, 24, 30, 169.

<sup>3</sup> 11 Journal of Congress, 121.

<sup>4</sup> Hildreth, U. S., III., 1st series.



**XI-XII**

**THE INTERNATIONAL BEGINNINGS  
OF THE CONGO FREE STATE**



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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TWELFTH SERIES

XI-XII

THE INTERNATIONAL BEGINNINGS  
OF THE CONGO FREE STATE

By JESSE SIDDALL REEVES, Ph. D.

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## TABLE OF CONTENTS.

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	PAGE
I. INTRODUCTION . . . . .	7
II. THE INTERNATIONAL AFRICAN ASSOCIATION AND THE INTER- NATIONAL ASSOCIATION OF THE CONGO . . . . .	17
III. THE CONFERENCE OF BERLIN . . . . .	27
IV. THE CONGO FREE STATE, AN APPANAGE OF KING LEOPOLD II. . . . .	69
V. BIBLIOGRAPHY . . . . .	91





# THE INTERNATIONAL BEGINNINGS OF THE CONGO FREE STATE.

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## INTRODUCTION.

If a map of Africa showing the political divisions of 1894 be compared with one representing conditions existing in 1876, the most wonderful changes will be noticed. To-day the partition of Africa is almost complete, at least as far as the appropriation of the interior by European powers is concerned. "The scramble for Africa" represents, in the main, a period of less than one generation. Eighteen years ago but four European powers had even a foothold on the Dark Continent. France held Algeria, Senegal and the Gaboon; Portugal maintained a show of authority on both the east and west coasts. Angola and Mozambique were characteristic Portuguese colonies, memories of a past greatness rather than witnesses of present strength. England alone, with her Cape Colony, seemed to have a territory really worth owning. The map of Africa has changed more in these past eighteen years than has that of America since 1763.

English influence is paramount in Egypt. Morocco has been hedged about by Spain and France; it continues to exist in its integrity only on account of the mutual jealousies of the European powers. France has extended her possessions from Algeria to the south over the Great Desert. British influence reaches, with the exception of a narrow strip, the "Wasp's Waist," in an unbroken line from "Cairo to the Cape." Germany has appeared as a colonial power of mighty pretensions. Two centuries ago the great Elector attempted to found a Prussian colony in Africa. The Bran-

denburg African Company was formed, and it existed until 1720, carrying on trade along the west coast as far as Angola. Then it came to an end, and Germany waited for a hundred and sixty years before she again secured a foothold on the African continent. Italy, too, has taken her place in the African division, holding the protectorate of Somaliland and the colony of Erythrea.

Of the eleven and a half millions of square miles in Africa, France has possessed herself of more than a quarter; Great Britain is but little behind, while Portugal and Germany each hold an extent four times greater than Germany's European empire. All of this work has been done since an American ventured to cross the Dark Continent. "Stanley's memorable journey, and especially his discovery of the great Congo waterway, may be regarded as the initiatory episode in the Partition of Africa."

The mouth of the Congo and the lower course of the river had been known for nearly four centuries. In the years succeeding the death of the Navigator Prince, the Portuguese maintained the interest which he displayed in African discovery. A succession of voyages down the West Coast resulted in the discovery of the Congo in 1484 by Diego Cam. We do not hear of the organization of a Portuguese colony of Congo. The relations between the native king of Congo and the king of Portugal were those of equals. Missionaries were sent out, and we are told that the country was readily converted to Christianity.<sup>2</sup>

In the latter half of the sixteenth century the Portuguese determined to colonize the region south of the Congo, and the story of their attempts at colonization is in striking contrast to their earlier relations with the king of Congo, which had been friendly for more than a century after Cam had discovered the country. After a preliminary voyage Paulo Diaz was sent out with the titles of "Conqueror, Colonizer

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<sup>1</sup> J. Scott Keltie, *The Partition of Africa*, p. 111.

<sup>2</sup> Pigafetta, *Relatione del Reame di Congo*, 1591; English translation by Margarite Hutchinson, 1881.

and Governor of Angola," with full power to establish a new colony. He left Lisbon in 1574 with seven hundred men. Landing on an island near the coast, he took possession in the name of Portugal. Soon afterwards he crossed over to the mainland and founded St. Paul de Loanda.<sup>1</sup>

As early as 1553 the English began to trade with the West Coast. In 1562 Captain John Hawkins made his memorable voyage to Guinea. Not long afterwards the English traders were organized into companies and continued their traffic uninterruptedly with varying success.<sup>2</sup>

The wars between Portugal and Spain made the West African colony of Angola a point of attack, with the result that it was captured by Spain or her ally, France. By diplomacy, however, Portugal succeeded in regaining her lost possessions. The first instance in which the Portuguese showed their talent in winning back the colonies lost during the war was in the treaty of Lisbon in 1668.<sup>3</sup>

Article 2 of this treaty makes restitution of all the conquered territories save Ceuta, but none of the Portuguese colonies to be *returned* are named; for this reason there is an uncertainty as to just what the Portuguese African possessions were at that time. The sweeping clause, that all those colonies of which Portugal had been dispossessed should be restored, appears in the treaty of peace between France and Portugal in 1713 (Dumont, VIII., Part I.; Calvo, Recueil, II., 109; Schoell, II., 109), and in like instruments between Spain and Portugal in 1715 (Dumont, VIII., I., 444; Calvo, II., 167; Schoell, II., 109) and 1761 (Calvo, II., 348; Schoell, III., 225; Koch, II., 162). It would seem plain from this that Portugal's claim over certain portions of the Western Coast of Africa was too vague to be clearly

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<sup>1</sup> Monteiro, Angola and the River Congo.

<sup>2</sup> MacPherson. *Annals of Commerce*, Vol. II.; Anderson, *History of Commerce*, Vol. II.; Rymer, *Foedera*, XIX., Hakluyt, III.; Martin, *British Colonies*, II.

<sup>3</sup> De Leon, *Pol. Sci. Quart.*, Vol. I., No. 1. The text of the treaty is in Dumont, VIII., Part 1, pp. 72-3; Schoell-Koch, I., Chap. 4.

defined, and for that reason the treaties can hardly be called "so many early title-deeds of Portuguese possession" of the country about the Congo. (Cf. Daniel De Leon in *Pol. Sci. Quart.*, Vol. I., No. 1.) The colonies of the various powers interested were the subject of a large part of the negotiations for the treaties of peace after the great Continental War in 1763. During this war, as in the earlier ones, Portugal had been stripped of her possessions in Western Africa; in the diplomatic controversy which led to the treaty, the Portuguese succeeded in acquiring their lost possessions. In the second article of the treaty the former ones were reaffirmed, and in article twenty-one it was stipulated that the French and Spanish troops should evacuate all the Portuguese territory in the African continent which they had occupied, and that the evacuated territories should be restored to the same basis which the treaties named in Article II. guaranteed (Calvo, II., 373). After this treaty the colonies of Portugal in Africa were not called in question until 1784, when the Lisbon Government ordered that a fort be erected at Cabinda, a town situated north of the Congo, to protect "its sovereign rights in Africa." No sooner was the fort completed than a French frigate appeared upon the scene. The fort was attacked for the reason given that its erection would interfere with the freedom of trade which the subjects of all European nations had long enjoyed upon that coast. The Portuguese commander offered to capitulate and the fort was demolished. In the articles of capitulation a protest was made in the name of Her Majesty the Queen of Portugal against the demolition of the fort, "as it could not be but prejudicial to the rights which she had over the domains upon that coast." The offer of capitulation was agreed to, but the matter was referred to the Courts of France and Portugal for decision.<sup>1</sup>

This question, transferred for settlement by the commanders from Africa to Europe, gave rise to a long and stub-

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<sup>1</sup> For the text of the Articles of Capitulation, with de Marigny's replies, see De Martens, *Recueil de Traités*, Vol. IV., p. 97 *et seq.*

born diplomatic discussion. The Portuguese Court still claimed sovereignty over Cabinda and the neighboring territory, and demanded reparation for the demolition of the fort and the insult done the flag. France refused to discuss the question of Portuguese sovereignty over the country of Cabinda, and would give no damages for any destruction to Portuguese property. The freedom of commerce along all the West African Coast was insisted upon as grounded upon long and uninterrupted rights. After two years of fruitless discussion, Spain was called in as a mediator.

In a protocol drawn up immediately after the signing of the treaty settling the question of the demolition of the fort, the limits of Portuguese sovereignty and of freedom of commerce were set forth in order that future contests on the subject might be avoided. The Portuguese ambassador proposed that French commerce "should never extend toward the south beyond the River Zaire (Congo) and Cape Padron, and the plenipotentiary of His Most Christian Majesty responded, in virtue of the powers of his court, that the commerce of the French in these countries should not be more limited than that of the English or Dutch, who extended their trade to the River Ambriz and Mossula. The plenipotentiary of Her Most Faithful Majesty declared that his sovereign possessed the region to the south of the River Zaire, not only on the coast of Angola, but even in the interior of the country to the east-north-east of Congo, and that this territory extended on the east to Casanga and toward the south to the extremity of Benguella. In that territory there were situated many districts, ruled by sub-governors, dependents of the Governor of Angola, many parishes and villages, inhabited by whites, mulattoes and negroes, who keep up an uninterrupted trade with the barbarous tribes. The sovereignty of these belongs exclusively to the Crown of Portugal. In consequence of this the Portuguese Queen (Maria I.) cannot permit or recognize the right of any other nation to traffic on the coast of Angola, unless it be restricted to that part situated north of the River

Zaire. As Portuguese subjects hold all trade on the coast south of this river and Cape Padron to be furtive, clandestine and illicit, the Crown of Portugal, never having authorized or consented to such a commerce, would not authorize or consent to it, but would oppose and hinder it."<sup>1</sup>

The French plenipotentiary announced, in reply, that he was authorized to declare "that the King, his master, would not arrogate to himself the right of contesting or of *recognizing* the titles which the Court of Portugal claimed over the property, sovereignty and commerce of the coast of Angola, extending from Cape Padron south; but that His Most Christian Majesty consented that the commerce of his subjects upon this coast should not extend to the south of Cape Padron on the condition that other nations should not extend theirs beyond this cape. Subjects of France should be treated in every respect as those of other nations, and should enjoy the same advantages which the others enjoyed in this respect, or the same advantages which should be allowed them by Her Most Faithful Majesty." (Protocol to the treaty of 1786, annexed.)

The terms of the protocol are quite in accord with what the earlier history of trade about the mouth of the Congo would lead us to expect. The sovereignty which the Portuguese claimed over the coast north of Cape Padron was but a technical one, grounded upon rights of discovery only and on Papal grants. The trade which the English, Dutch and French had maintained uninterruptedly since the sixteenth century gave a right to freedom of commerce along the coast which the Portuguese could not destroy by the erection of any fortifications north of Cape Padron. As was shown in the protocol, the French king did not pretend to recognize Portuguese rights of sovereignty south of the Congo; but the point for which the French were striving, namely, freedom of commerce in the neighborhood of the Congo and Cabinda, was settled once for all. This

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<sup>1</sup> De Martens, R. de T., IV., 102.

treaty becomes of the greatest significance when the Anglo-Portuguese treaty of 1884 is considered, in which England proposed to recognize Portuguese sovereignty over the country north of Cape Padron, that is, over the mouth of the Congo.

Much light is thrown upon the question of sovereignty upon the West Coast of Africa by the series of treaties between England and Portugal, beginning with the treaties of alliance in 1807 and continuing down to 1884. Article 10 of the treaty of 1810 concerns the slave-trade, and in it the Prince Regent of Portugal promised not to permit any of his subjects to engage in the trade in any part of Africa not belonging to the States of Portugal, in which the trade had been abandoned by the Powers and States of Europe who had heretofore engaged in this commerce; but he reserved to his subjects the right of buying and selling slaves in the parts of Africa belonging to Portugal. "It should be distinctly understood that the stipulations of the present article must not be considered as rendering null and void, or as affecting in the least the rights of the Crown of Portugal to the territories of Cabinda and Mollembo (rights which the Government of France has already considered questionable), nor as limiting or restraining in the least the commerce of Ainela and of those parts of Africa, called by the Portuguese 'La Castada Mina,' belonging, or at least *claimed* by, the Crown of Portugal, H. R. H. the Prince Regent having resolved neither to abandon and renounce his just and legitimate pretensions with respect to them, nor the right of his subjects as to such trade with those places in the same manner they have enjoyed up to this time."

From this treaty it is seen that Portugal renewed the claims to the country about Cabinda which France had refused to recognize. While Great Britain appeared to recognize Portugal's sovereignty, it is plain that she did so in order to restrict the slave-trade as far as possible. The

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<sup>1</sup> De Martens, *Nouveau Recueil*, I., 245.

provisions of the treaty of 1810 were not kept by Portugal, and her subjects continued to engage freely in trade in negroes even in those territories where such traffic had been forbidden. Five years later a new treaty was drawn up, but this was not, as the earlier one had been, a treaty of alliance; it was designed solely to suppress the slave-trade.

In this instrument, signed at Vienna, January 22, 1815, there is no mention of Portuguese sovereignty save as in the terms of the treaty of 1810; instead, there is a direct statement to the effect that "from and after the ratification of the treaty and the publication thereof, it shall not be lawful for any of the subjects of the Crown of Portugal to purchase slaves, or to carry on the slave-trade, on any part of the coast of Africa north of the equator, upon any pretext or in any manner whatsoever." (Article I.)

Shortly after this treaty was drawn up, the Declaration of the Congress of Vienna was made (February 8, 1815); but even then the Portuguese did not suppress the illegal traffic as they had agreed to do by the treaties mentioned above.

On this account there was an additional convention at Lisbon in July, 1817. This declared that the slave-trade should be permitted only in those countries on the West Coast of Africa belonging to Portugal between the 8th and 18th degree south latitude and in "those territories on the coast of Africa south of the equator over which His Most Faithful Majesty has declared his rights, namely, the territories of Molembo and Cabinda, from the 5th degree, 12 minutes to the 8th degree south latitude."

Subsequent articles in this treaty give exact provisions in regard to the treatment of slave-traders and slave-ships. Although British cruisers were given powers of search, and commissioners were appointed to enforce the treaty stipulations, the trade did not materially decrease. After many complaints from Great Britain, Portugal agreed to put an effectual stop to the slave-trade in 1823, but later, the time was extended to February, 1830.<sup>1</sup>

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<sup>1</sup> Heeren, *Manual of Hist.*, II., 388.



Even after Great Britain had succeeded in making Portugal declare the slave-trade a crime in all parts of her dominions, the traffic continued, with its centers at the hitherto contested port of Cabinda and at Ambriz, situated south of the Congo. Great Britain now took a more aggressive position than had France, though for a different reason, and declared that Portuguese sovereignty along the entire Western Coast of Africa was to be questioned, since the possession of that region was neither effective nor permanent. On this account Portugal agreed to form a new treaty by which the slave-trade was to be immediately suppressed.<sup>1</sup>

Soon afterwards the British Government agreed to recognize Portuguese sovereignty over Angola if Portugal should succeed in crushing completely all the trade in negroes within a certain time. Portugal refused to allow her sovereignty to be called in question for any reason whatever. Great Britain, in retaliation, renewed the doubts which had been expressed in 1842, and "refused to allow any military occupation of the West Coast of Africa by Portugal, and threatened to resist force with force."<sup>2</sup> Such a declaration on the part of the British Government quickened the efforts of the Portuguese, and by the year 1871 a treaty was concluded between the two powers, in which it was stated that Great Britain, assured that the slave-trade was at an end in Portuguese dominions, was willing to abolish the commissioners instituted for the purpose of stopping the traffic. No further question is raised about Portuguese supremacy over Angola, as extending from Benguella on the south to Ambriz on the north. But north of Ambriz, at the mouth of the Congo and beyond, Portuguese power was practically dead. Trading factories, under flags of different nationalities, dotted the coast; the interior remained unknown save for the information which native traders brought to the coast and that gained by occasional travelers.

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<sup>1</sup> 1842, *Nouveau Recueil Général de Traités*, cont. by F. Muirhard, III., pp. 244-327.

<sup>2</sup> De Leon in *Pol. Sci. Quart.*, Vol. I., No. I.

With the treaty of 1871, announcing the discontinuance of the slave-trade among civilized nations, a new era begins for the Congo Country.

Soon afterwards the interior was made known by the expeditions in 1872 of Grandy, for the relief of Dr. Livingstone, by the German expedition under Captain Hohmeyer, and especially by the efforts of Henry M. Stanley, leading immediately to the founding of the Free State of the Congo.

Until a few years ago knowledge which Europeans possessed regarding the Congo Country was very vague. Few travelers had penetrated inland, and civilization, as much of it as reached this part of Africa at all, stopped at the coast. Tuckey's expedition in 1816 on the Congo River was the first of the modern scientific expeditions to explore the country.<sup>1</sup>

Lieutenant Owen, in 1826, and the Frenchman, D'Ouville, in 1827, visited the same region, as did the German scientist, Dr. Bastian, in 1857.<sup>2</sup> The same year Captain Hunt ascended the river as far as the Cataracts, and Burton made a similar journey in 1863.

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<sup>1</sup> Captain J. K. Tuckey, "Narrative of expedition to explore the River Zaire." London, 1816.

<sup>2</sup> "Afrikanische Reisen," Bastian, Bremen, 1859.

## II.

1876-1884.

THE INTERNATIONAL AFRICAN ASSOCIATION AND THE  
INTERNATIONAL ASSOCIATION OF THE CONGO.

In 1876 Leopold, King of Belgium, issued invitations to a conference at Brussels to many of the most distinguished geographers of Europe and America. The purpose of this meeting was to discuss and devise means by which Equatorial Africa might be opened up to European civilization. As a result of it, a formal organization was made, under the name of "L'Association Internationale Africaine." Branches of this association were to be founded in all of the principal countries of Europe and in the United States. A central executive committee of four was formed, with King Leopold at its head. Associated with him were Dr. Nachtigall, the celebrated African explorer, of Berlin, M. de Quatrefages, of Paris, and Mr. Henry S. Sanford, of Florida, who had been minister from the United States to Belgium. Another conference was called to convene in June at Brussels, that a more perfect organization might be effected and practical steps taken to foster the ends of the association.<sup>1</sup>

Before the conference of 1877 met, the proposed national organizations in all parts of Europe were completed. The first of these to organize was that of Belgium, in November, 1876. The Belgium National Committee was composed of fifty-six members, with the Comte de Flandre at its head. It immediately set to work to make known the aims of the association and to organize a national subscription, the money raised to be turned over to the International Com-

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<sup>1</sup> See Proc. Roy. Geog. Soc., July, 1877.

mittee in aid of the plans as set forth by the conference of 1876. The subscription was successful, and the sum of 287,000 francs was sent to the International Secretary in June, 1877 (Minutes of 1877 meeting, "Annexe D").

The German National Committee organized in December, 1876, and had among its members distinguished men, such as Von Moltke and the Prince von Reuss, who became the president of the organization. In the same month the Austrian branch was organized (*Ibid.*, "Annexe B"). The society numbered 350 members by June, 1877, and was under the honorary presidency of the Archduke Rudolph. In May, 1877, a meeting was called in New York by the American committee, and an organization was perfected, with Mr. John H. B. Latrobe, the President of the African Colonization Society, as president. Mr. Sanford was made a delegate to the June Conference at Brussels.

It was decided at the June meeting that an expedition be sent from Zanzibar to Lake Tanganyika, with the purpose of establishing a scientific station either on the shores of the lake or as near it as circumstances would permit. The station should be the point of departure for an exploring expedition toward the Atlantic ocean. The executive committee was authorized at the same time to elaborate plans for a party to start from the Atlantic and proceed toward the Zanzibar Coast. Sub-stations were to be erected wherever practicable, and these were to become of greatest importance in the opening up of the country, "the points of contact between civilization and savagery." The Conference decided that the Executive Committee should have the greatest liberty of action possible in the organization of these stations, but general rules were adopted for the management of the stations. They were to be scientific and hospitable in character. It was declared that one of the ulterior objects of a station should be the repression of the slave-trade.<sup>1</sup> One other act of this session which may be

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<sup>1</sup> Minutes of June session, p. 50.

noted was the adoption of an emblem for the Association: a blue flag with a gold star.

The expedition, to start from Zanzibar and penetrate westward two hundred leagues to Lake Tanganyika, was organized in Belgium late in 1877, and two years later, after many difficulties and disappointments, a station was established at Karema, on Lake Tanganyika, now within the German sphere.

After the discovery of the Upper Congo by Stanley in 1877, interest centered in that region, and a separate committee of the International Association was organized to study particularly the Country of the Congo. This branch of the Association, taking the name of Comité d'Études du Haut Congo, was organized in Brussels on November 25, 1878, with a subscription of a million francs. Steps were at once taken to establish some practicable means by which a regular communication might be established between the lower Congo and the upper stream, as navigation along the entire course of the river was impossible on account of the many cataracts and rapids situated about two hundred miles from the mouth and extending for three hundred miles. The committee was to pursue "essentially philanthropic and scientific aims," and it should not give itself to the operations of commerce. While the stations were to have nothing of the commercial spirit, it was not long before something of this nature was assumed. In a treaty with one of the chiefs the committee engaged itself to carry on commerce in its establishments, and it even reserved the monopoly of it.<sup>1</sup> It adopted the flag of the Association Internationale, and engaged itself to erect stations similar to those founded by the expedition from the east coast.<sup>2</sup> To this general task there was added the special one of making available to the world that vast portion of Equatorial Africa which Stanley had just made known.

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<sup>1</sup> Moynier, *L'E. I. du C., au point de vue juridique*; "Le Zaïre et les Contrats de l'A. Int.," by Magelhaes; "Portugal et la France au Congo, par un ancien diplomate."

<sup>2</sup> *Resultats du Comité d'É. du H. C., Bruxelles. 1882.*

Stanley was engaged to undertake an expedition to the Congo as the agent of the Comité; and early in the year 1879 he left for Africa. The necessary equipment for the expedition, portable steamboats and iron houses, were sent directly to the mouth of the Congo, while Stanley went first to Zanzibar to re-enlist as many as possible of the Zanzibaris who had accompanied him on his earlier journey across the "Dark Continent." On the 14th of August, 1879, the expedition met at the mouth of the Congo, and the exploring party, as assembled there, was composed of men of various nationalities, altogether a company perhaps more cosmopolitan than the Comité for which it worked. In Stanley's own words, "On August 14, 1879, I arrived before the mouth of this river to ascend it, with the novel mission of sowing along its banks civilized settlements, to peacefully *conquer* and *subdue* it, to remould it in harmony with modern ideas into *National States*, within whose limits the European merchant shall go hand in hand with the dark African trader." The first station, Vivi, was founded in February, 1880, and before Stanley returned to Europe in 1884 twenty-two stations had been established along the Congo River and its affluents. In order to found a station Stanley was obliged to make one or more treaties with the native chiefs, who were to cede to him for the Association large stretches of territory.

In August, 1884, Stanley returned to Europe and reported to King Leopold that he had successfully executed the task assigned him. During the four years of his stay in the Congo Valley he established twenty-two stations and made upwards of three hundred treaties with the native chiefs of the country, by which their lands were ceded to the International Association of the Congo.

It should be noted, in passing, that the Comité d'Études was known under three names. Where the affairs of the whole region were concerned, the name International Asso-

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<sup>1</sup> Congo, I., 59.

ciation of the Congo appears; and the government of the stations on the Lower and Upper Congo was differentiated into two committees, the Comité d'Études du Haut-, et du Bas-Congo, but the personnel in all three was the same, and the differences in title were merely for convenience. It was not long before the International Association of the Congo was used to the exclusion of the other two.

The treaty of Leopoldville, Upper Congo, executed on the 24th of April, 1883, may be taken as a type of these treaties in which cessions of territory were made and, reciprocally, protection was offered by the Comité to the chiefs. "We, the undersigned, chiefs of the district of N'Kamo (etc., etc.) and of all the districts extending from the River Congo to Leopoldville and up to Ntamo up to the River Lutess and the mountains of Sama Sankou, have resolved to put ourselves, as well as our heirs and descendants, under the protection and patronage of the Comité d'Études du Haut Congo, and to give power to its representatives at N'iamo to regulate all disputes and conflicts that may arise between us and foreigners of whatsoever color, residing out of the district of N'Kamo, in order to prevent strangers, animated by wicked intentions or ignorant of our customs, from exciting, embarrassing or endangering the peace, security and independence which we now enjoy. By the present act we also resolve to adopt the flag of the Comité d'Études du Haut Congo, as a sign for each and all of us that we are under its protection. We also solemnly and truly declare that this is the only contract we have ever made, and that we will never make any contract with any European or African without the concurrence and agreement of the Comité d'Études. Signed freely by the Chiefs of the region."

The validity of these treaties was widely debated in Europe. It was held by some jurists, among them Prof.

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<sup>1</sup> Text in U. S. Sen. Mis. Doc. 59, 48th Cong., 1st sess., p. 50. More than a thousand treaties have been negotiated with the native chiefs. *Les Codes du Congo*, VI.

Arntz and Sir Travers Twiss, that individuals can acquire title to territories ceded by native chiefs. Precedents were cited to show that this view was correct. The Puritans in New England, Penn in his colony, made treaties with Indian chiefs. In recent times the same principle recurs in the treaties of 1877-8 made by the British North Borneo Company with the Sultans of Bunei and Sulu, and in those of the various African companies with the native chiefs.

"New sovereignties, at the head of which are individuals or associations, the concessionaries of the chiefs of savage tribes, exist of themselves, of their own right and their own strength, without having need of the recognition of other States." "It depends upon the 'convenience' of other States to recognize or not these new sovereignties. But whatever may be their determination in this respect, the want of recognition does not give them the right to act as if these sovereignties did not exist, and to consider their territories susceptible of occupation." *De facto* governments are considered as legitimate by most nations, particularly by the United States and Great Britain.

In opposition to these views is the argument brought up by M. G. Rolin-Jacquemyns (Rev. de Droit Int., XXI., 169) and by De Martens (Rev. de Droit Int., XVIII., 147), that individuals cannot acquire territory with a public title (*occupatio imperii*) except by virtue of a mandate, delegation, or, at least, a ratification of existing powers.

Whatever the legal status of the treaties which the Comité had made, they were, of course, only valid if the chiefs had unquestionable rights over their territory. In 1846 the British Government had distinctly questioned Portuguese right to the coast north of the port of Ambriz, situated in 7 degrees 51 minutes south latitude. Great Britain allowed this question to lie in abeyance, as Portugal acceded to the terms of the treaty proposed by the British Government; but

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<sup>1</sup> Klüber, *Droit des Gens Moderne*, par. 23; Heffter, *Le Droit International Publique*, p. 42, par. 23, p. 104, par. 51; Bluntschli, *Le Droit International Codifié*, pars. 28 and 38.



only openly so, for, between the years 1856 and 1876, a number of treaties were drawn up between Great Britain and the native chiefs of the Congo Valley and the Cabinda Country, in which the chiefs promised to put a stop to the slave-trade in their territories.<sup>1</sup> Had Portugal maintained an effective control during those years, these treaties would have immediately been called in question, although had England recognized Portuguese rights to the country at a later time they would still be valid. In addition to the treaties made with the native chiefs, further evidence is shown that Portugal did not effectually hold the region about the Congo and its mouth, in the fact that each of the companies having factories at Banana Point, situated at the mouth of the Congo, was permitted without question to raise over its premises the flag of its own country. Thus there was a system of personal sovereignty, "the flag of the nation from which the trader felt himself entitled to claim protection if he should be wronged by a native chief or by a trader of another European nation."<sup>2</sup> Besides the Portuguese, the French claimed sovereignty over a vast stretch of territory north of the Congo by virtue of treaties made in the name of the French Government by M. Savorgnan de Brazza, who had been sent by the French Committee of the International African Association and had made an overland journey from Cabinda to the Congo.<sup>3</sup> Purely scientific investigation seems to have been soon put aside, and in 1880 he made a number of treaties, by which France gained the right to an enormous amount of territory, with the right bank of the Congo as a boundary, between the fifth and first degrees south latitude (approximately).

Such was the condition of affairs which met Stanley as he ascended the Congo: to find the ground on the north of the river pre-empted for a foreign power by one who had been

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<sup>1</sup> Rev. de Droit Int., Vol. XV., art. by Sir Travers Twiss.

<sup>2</sup> Rev. de Droit Int., Vol. XV., art. cit.

<sup>3</sup> That King Leopold bore part of the expense is asserted by Mr. Sanford, No. Am. Rev., 1890, Am. Interests in Africa.

an officer of the Association. Stanley succeeded, however, in gaining cession of all the territory along the left bank as far as the French domain extended, and beyond it with a vast outlying district on both banks of the river to its source.

Portugal had never bothered herself about the Congo Country until some one else became interested in it. Now, as before, she protested against the interference with her rights, and the secretary of the Portuguese Geographical Society at Lisbon wrote a letter to Col. Strauch, one of the officers of the International Association, in which he asked: "1st. Are Messrs. Stanley and Savorgnan de Brazza to be considered as the explorers of the International African Association, and as such to be quite subordinate to the purely scientific and humanitarian intentions of the said association, excluding absolutely all individual ideas and all political mission or authority?

"2d. Are these gentlemen authorized by the International Association, or with the knowledge or sanction of the same, to display on their expeditions or at their stations any national flag, or to effect, in the name of any country, treaties and compacts of a political nature?

"3d. Does the International Association (which has refused to accept any political character or authority) undertake the responsibility of manifestoes, intrigues and intentions of such nature, on the part of its explorers, towards the native populations and other people?"

This letter was answered by Col. Strauch on the 25th of October as follows: "I will not delay in answering the questions you put to me in your letter of the 13th of October.

"1st. As far as the International African Association knows, M. de Brazza had a mission from the French Committee of the Association and grants from the French Executive. Stanley, on the contrary, is in the service of the International Comité d'Études, which has commissioned him to found scientific and halting stations on the Congo, and also to furnish it with any elements of study likely to further any enterprise in that country.

"2d. The flag of the Association is the only one that is hoisted over stations which Stanley has established. *Belgium, as a state, does not wish to possess either a province or even an inch of territory in Africa.*

"3d. The Association holds to its published rules, and its line of conduct is regulated by the same."

Soon afterwards negotiations were entered into by Portugal and Great Britain, the result of which was a treaty proposing to recognize Portugal's sovereignty at the mouth of the Congo. It was stipulated that "the treaty be drawn on the further basis of establishment of freedom of navigation on the Congo and Zambesi rivers and all their tributaries, establishment of a liberal tariff, with a low minimum, in all Portugal's possessions in Africa, and, lastly, cession to Great Britain of all the claim of Portugal, of whatever nature, to all territories situated on the West Coast of Africa between the fifth degree east and the fifth degree west longitude." "In order to settle the disputes about the sovereignty at the mouth of the Congo, to provide for the complete extinction of the slave-trade and to promote civilization and commerce in Africa, it was stipulated that Great Britain recognize the sovereignty of Portugal over the Western Coast of Africa between the fifth degree twelfth minute and the eighth degree south latitude and inland as far as Nokki."

This seemed to be the deathblow to the work of the Association. Portugal, though she had sacrificed some territory, had gained her point after a controversy of a century; but however dark the future of the African Association might seem, there was soon to be a change, for in April, 1884, the United States recognized the flag of the International Association "as that of a friendly government." Soon afterwards Germany became an interested party, and the affairs of the Association were to take a fresh start on account of the aggressive policy of Prince Bismarck. In October, 1884, he issued invitations to a Conference at Berlin, where an agreement might be made on the following principles:

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<sup>1</sup> Treaties and Conventions of U. S. and Foreign Powers, p. 214.

“1. Freedom of commerce in the basin and mouths of the Congo.

“2. Application to the Congo and the Niger of the principles adopted by the Congress of Vienna, with a view to sanctioning free navigation on several international rivers, principles afterwards applied to the Danube.

“3. Definition of the formalities to be observed in order that new occupations on the coast of Africa might be considered effective.”

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<sup>1</sup> Sen. Ex. Doc. No. 196, 49th Cong., 1st Session, page 8.

## III.

## THE CONFERENCE OF BERLIN.

1. *The appearance of Germany as a colonizing power.*

It has been said of the three great powers of western Europe, "that France has colonies but no colonists, Germany has colonists but no colonies, and that England alone has both." This was true of Germany before the year 1884, but it can no longer be said of her, for it was owing to the aggressiveness of the Chancellor Bismarck that the real "scramble for Africa" was started, and, as a result of it, Germany has to-day an area of more than 800,000 square miles in Africa alone. The sudden appearance of Germany in the colonizing field allowed her to make great progress in the acquisition of territory before other powers, such as Great Britain, had seriously considered her pretensions as a colonial empire. But the new rôle in which Germany was about to play was not owing to a sudden change in her policy; there are many indications preceding the period of German unity under Prussian hegemony which show a desire to extend the sphere of the German influence beyond the confines of Europe. Outwardly, at least, Germany had been content to furnish colonizing material for other States, hoping to be repaid by the increase of trade resulting thereby. Many individuals were at work, however, to foster this colonizing spirit and to direct it in a way that should be more immediately advantageous to Germany as a whole. Long before the formation of the empire different colonizing organizations had been started in various sections of Germany. In 1843 a society was formed at Düsseldorf for the purpose of promoting emigration to Brazil.<sup>1</sup> Soon other

<sup>1</sup> Keltie, 163.

emigration societies were formed, directing their attention to Brazil, Chili, Nicaragua, Texas and elsewhere; but no attention was paid to Africa as a field, even though German explorers had done much to extend knowledge respecting that continent. In 1868 a society had been formed, the "Centralverein für Handelsgeographie und Förderung deutscher Interesse im Ausland." The purposes of this society were broad and comprehensive, and it has doubtless done much to stimulate the colonial spirit; but at its foundation no attention was paid to Africa, though the East Coast had been recommended by an eminent German geographer, Von der Decken, as a suitable direction for activity. Colonization was not turned towards Africa until some time after the union of Germany had become an accomplished fact.

We have seen that a branch of the International African Association was founded at Berlin in 1876; this developed into the German African Society in 1878 by a union with the German Society for the Exploration of Equatorial Africa, founded in 1873. From now on, the attention of the German world was more and more directed to Africa, both on the East and on the West Coast. This was greatly intensified by various scientific explorations carried on by German subjects. All these facts paved the way for the idea of German colonization, and gave in years to come a popular support to the extension of the German Empire, the particular policy of the Chancellor.

When the German Colonial Society was founded in 1882 hearty support was given it in all parts of the empire, and within a year it had a membership of more than three thousand; three years later this number was more than trebled. In 1883 the German African Society concentrated its attention upon the region of the Niger and Congo rivers, and it was urged that the government take steps to prevent other nations from occupying these regions and to keep them open to the trade of all nations.<sup>1</sup> Almost simultaneously

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<sup>1</sup> Keltie, ch. XII.

with this, the Chambers of Commerce at Hamburg, Lübeck and Bremen, in reply to certain inquiries of the Chancellor, advocated a policy of annexation as the best means of encouragement to German trade in those regions. It has been said that these resolutions of the Chambers of Commerce had more to do with forming the policy of Bismarck than perhaps anything else. Backed by popular enthusiasm, which was increased by the colonial literature, and by strong commercial interests on the West Coast, the Chancellor was able to plant the German flag over a large tract of territory before the English were scarcely aware that there was such a thing as a German colonial policy. Clever diplomacy gave to the empire the territories of Damara, Namaqua and Angra-Pequena in southwest Africa, hedging in British authority, cutting down its "sphere of influence," and raising the question of the "Hinterland," afterwards to be of so much importance in the "partition of Africa."

In the light of German activity of this sort, the action of the German Chancellor in objecting to the Anglo-Portuguese treaty of 1884 at once becomes clear. The complete change in British policy which assented to Portuguese sovereignty over the mouth of the Congo would give serious check to the extension of German interests on the West Coast. This territory, which had been little thought of commercially since the decline of the slave-trade, was again brought to the attention of the European world by the exertions of Stanley and other explorers. Germany was anxious to be concerned in the future of the country. Bismarck was aware that if Portuguese pretensions should be recognized, the future of the Congo Country would be not unlike that of any other Portuguese colony on the West Coast, such as Angola. Bismarck's opinion of Portugal as a colonial power may be best shown by a letter sent through Count Munster to Earl Granville (June 7, 1884). "We are not in a position to admit that the Portuguese, or any other nation, have a previous right there [on the Congo]. We share the fear which, Lord Granville admits, has been expressed by

merchants of all nations, that the Portuguese officials would be prejudicial to trade, and . . . we cannot take part in any scheme for handing over the administration, or even the direction, of these arrangements to Portuguese officials. Even the provision of limiting the dues to a maximum of ten per cent., the basis of the Mozambique tariff, would not be a sufficient protection against the disadvantages which the commercial world rightly anticipates would ensue from an extension of the Portuguese colonial system over the territories which have hitherto been free.”<sup>1</sup>

The opposition to the Anglo-Portuguese treaty, begun in England by the condemnation of it by various chambers of commerce, was taken up by Germany and seconded by France. Earl Granville was forced to abandon the position taken by the British Cabinet, and it was proposed that, to settle the difficulty, an International Conference be held. Curiously enough the initiative was taken by Portugal, for, as a weaker power, she could not expect to gain much by such a conference.

It should be noted that, before arranging the treaty, Granville had declared that acceptance by other powers of the Anglo-Portuguese treaty was indispensable before it could come into operation, and that there was reason to believe that this acceptance would be refused, “which would necessarily delay the ratifications.”<sup>2</sup>

The plan was taken up by Bismarck, and, with the concurrence of France,<sup>3</sup> invitations were issued to the various powers to meet in Berlin on the 15th of November, 1884, there to decide upon various matters of international interest concerning the extension of European colonization to Equatorial Africa.

## 2. *The Berlin Conference and its work.*

It had been Bismarck’s idea to veil, as far as possible, the political intent of the proposed conference, so that invita-

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<sup>1</sup> Keltie, p. 145-6.

<sup>2</sup> Stanley, Congo, II., 381.

<sup>3</sup> Bismarck to Courcel, Sept. 13, 1884; C. to B., Oct. 2.



tions were issued to all the powers of Europe (except Switzerland) and to the United States. In this way was secured representation of powers which had no colonial possessions, and hence no territorial pretensions in Africa. All of the powers, however, were supposed to be interested in the extension of African commerce. It was for this reason that, on the 10th of October, 1884, the United States was asked to participate in the proposed conference.<sup>1</sup> An additional reason for the participation of the United States was that "Liberia was under its protection." This was the main incentive that had been urged, according to the Minister of the United States, Mr. John A. Kasson.<sup>2</sup>

The Secretary of State, Mr. Frelinghuysen, evidently in doubt as to whether the United States could accept the invitation of the German Government, asked Mr. Kasson's opinion upon the importance of the United States sending a representative to the conference, and for information in regard to the character of the measures to be discussed. Mr. Kasson thought that the United States Government could very properly take part in the conference without departing from its traditional policy of non-interference.<sup>3</sup> The first object of the Conference, "Liberty of commerce in the basin and mouths of the Congo," was deemed quite in accord with the policy avowed by the United States in the recognition, in April, 1884, of the flag of the International African Association "as that of a friendly power." The minister in Berlin urged that, so far as the scope of the Conference offered nothing which might embarrass the United States, it should, as a commercial nation, with other powers, assist in recommending regulations for trade along the Western Coast of Africa. That such a course was not out of harmony with the policy of the United States, he cited as precedents the part which this country took in

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<sup>1</sup> Letter from Mr. Von Alvensleben to Mr. Frelinghuysen. Sen. Ex. Doc. 196, p. 1.

<sup>2</sup> Kasson to Frelinghuysen, Oct. 13, 1884.

<sup>3</sup> Letter, Kasson to Frelinghuysen, Oct. 15, 1884.

the international conferences respecting the Scheldt Dues, postal affairs, and a common meridian. To this last the various monetary and sanitary conferences might have been added, for they were all unlike the objects of the meeting to be held in Berlin. The idea is emphasized that the meeting was to be a conference, "not a finality, but a mere machine for the production of a fabric adapted to general use, which each government will afterwards approve or repudiate at its discretion."

Acting on the suggestion of Mr. Kasson, the Secretary of State, on the 17th of October, accepted the invitation of the German Government, with the understanding "that (so far as this government is concerned) the business of the Conference be limited to the three heads mentioned in your note, dealing solely with the commercial interests of the Congo region and of Western Africa, and that, while taking cognizance of such establishments of limits to international territorial claims in that region as matters of fact, the Conference is not itself to assume to decide such questions. The object of the Conference being simply discussion and accord, the Government of the United States, in taking part therein, reserves the right to decline to accept the conclusions of the Conference." By a telegram of the same date, Mr. Kasson was instructed to act as the representative of the Government, and, by letter, to use his own discretion in the extent of his participation in the Conference, keeping always in view the non-intervention policy of the United States in any disputes among other powers regarding territorial questions. Nevertheless, it was noted that in accord with the policy of the United States in recognizing the flag of the African Association, this government would prefer a neutral control of all the territories in the Congo Valley. "Whether the approaching Conference can give further shape and scope to this project of creating a great state in the heart of Western Africa, whose organization and administration shall afford a guarantee that it is to be held for all time, as it were, in trust for the benefit of all peoples, remains to be seen.

At any rate, the opportunity which the Conference affords for examination and discussion by all the parties indirectly or directly in interest should be productive of broad and beneficial results.”<sup>1</sup>

With such a hint to our representative in regard to the desirability of neutrality in the Congo Basin we realize that the Conference could not have had purely commercial purposes in view. This fact is still more apparent when one sees the associates of Mr. Kasson at Berlin. On the 20th of October, Mr. Kasson, on his own initiative, wrote a letter to Henry M. Stanley, asking him to be present at Berlin during the sessions of the Conference, believing, as he said, that the “information of an expert would be of great utility to him as the United States representative at the Conference.” Mr. Kasson added that “as this action would be in harmony with the interests you represent, it was believed that the International Association would also desire your presence here as requested.”<sup>2</sup> Soon afterwards Mr. Kasson asked that Mr. Henry S. Sanford be made an associate delegate, if his services could be secured without pay. Mr. Sanford accepted the position, and afterwards took an active part in the discussions of the Conference. It was in many respects natural that Mr. Kasson should have desired the assistance of experts during the meetings of the Conference; while it is interesting to note that Mr. Stanley was present, “nominally as a geographical expert on behalf of the United States, he was in reality there to look after the interests of his patron, the King of the Belgians.”<sup>3</sup> Mr. Sanford was likewise interested in the success of the plans of Leopold. Once minister of the United States to Belgium, he became one of the officers of the International African Association. In the treaty entered into between the United States and the International Association, by which the flag of the latter

<sup>1</sup> Instructions of Frelinghuysen to Kasson, Oct. 17, 1884.

<sup>2</sup> Kasson to Stanley, Oct. 20, 1884. Sen. Ex. Doc. 196, p. 6.

<sup>3</sup> Keltie, p. 207.

was recognized, it was Mr. Sanford who had acted on behalf of the Association. The reasons for Mr. Sanford's presence were thus described by Mr. Kasson:<sup>1</sup> "After careful reflection upon the probable phases of discussion, and the central position in them of the 'African International Association,' in antagonism with Portugal and France, I believed it would be beyond doubt useful to have the assistance of Mr. Sanford, who had successfully presented the claims of that association to you for recognition. But even a stronger motive than that was the great usefulness of an associate in such a conference who can devote his time to those outside preliminary conversations which often shape the action of the conference in advance."<sup>2</sup>

In accordance with the invitations issued by Germany, the representatives of the various powers met in Berlin on the 15th of November, the session being opened in the Conference Hall in Prince Bismarck's palace with a speech of welcome from the German Chancellor. The Dean of the Diplomatic Corps, the Count de Launay, representing Italy, replied in a few words, and moved that Prince Bismarck be made the chairman of the Conference. In accepting the position, the Chancellor outlined the reasons for which the Conference had been called. The first was that humanitarian one, in which all the governments joined, of desiring to promote the civilization of the natives of Africa by opening the interior of that continent to commerce, to furnish means of instruction to its inhabitants by the encour-

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<sup>1</sup> Kasson to Frelinghuysen, Oct. 24, 1884.

<sup>2</sup> In this connection, the letter from U. S. Agent Tisdell to Secretary Bayard, dated Buenos Ayres, March 20, 1886, is extremely interesting. See U. S. Senate Executive Document No. 196, 49th Congress, 1st session. Mr. Tisdell's report is very valuable, being the official opinion of an agent sent by the United States to examine into the commercial resources of the Congo Country. His account is at widest variance with that of Mr. Stanley, and hence it was subjected by the latter to the most angry criticism. Later events have proved the truth of most of Mr. Tisdell's assertions concerning the commercial importance of the Lower Congo.

agement of missions and to prepare a way for the abolition of the slave-trade, "proclaimed by the Congress of 1815 as a sacred duty of all the Powers." (Protocol No. 1.) The fundamental idea of the Conference, he declared, however, to be that of facilitating access to the interior of Africa to all commercial nations. In order to carry out this, he proposed that all goods intended for the interior of the continent be admitted duty-free everywhere on the African coast. As this was evidently quite outside the programme of the Conference, he confined himself to expressing the hope that by means of the Conference negotiations might be started among the States interested, which should meet the requirements of commerce as regards transit in Africa. "The business of the Conference," said the Chancellor, "bears simply upon freedom of commerce in the basin of the Congo and its mouth. Consequently the Government of His Majesty the Emperor will have the honor to submit to the deliberations of the Conference the draft of a declaration treating of the freedom of commerce in that part of Africa. This will contain the following propositions:

"First. That any power which might exercise sovereign rights in that region should allow free access to it to all flags without distinction. It should grant no monopolies and levy no taxes save those necessary for the reimbursement of expenses incurred in the interests of commerce.

"Second. All powers exercising rights or influence in the basin of the Congo and its mouth were to pledge themselves to co-operate in the abolition of slavery and to favor missions and other institutions intended to uplift the native population.

"Finally, that the declaration set forth by the Congress of Vienna, proclaiming freedom of commerce upon rivers flowing through several States, be applied to the Congo and Niger rivers in Africa, though the German Government would gladly accept any propositions tending to regulate, outside the Conference, the question of free navigation on all the rivers of Africa."

The fundamental principle of the draft was to secure full

and entire freedom of navigation to all flags and exemption from all taxes, save those necessary to pay for the maintenance of secure navigation. Passing from these considerations, at once humanitarian and commercial, Prince Bismarck turned to those lying more particularly within the domain of international law. While it was not within the scope of the Conference to adjudicate upon pre-existing territorial claims in Africa, it might lay down general rules which should govern future colonial expansion in that continent. With this end in view, he outlined a scheme for a declaration by the Conference in regard to new occupations by the various colonizing powers. "The validity of any new possession shall be dependent upon the observation of certain powers, such as simultaneous ratification, in order that other powers may be enabled to recognize that act or to present their objections." In addition to publicity, *effectiveness* should be necessary in order that a power might hold new lands: "the occupying power should within a reasonable time furnish evidence, by positive institutions, of its intention and ability to exercise its rights there, and to fulfill the duties connected therewith."

The tendency of Prince Bismarck to make generalizations concerning all the rivers of Africa did not escape the observation of the representatives of other powers present at the Conference. At the conclusion of the Chancellor's address, Sir Edward Malet, representing Great Britain, replied that while his government would be glad to see the principles of the Congress of Vienna extended to the Congo and the Niger, and as well to other African rivers, he was not authorized to discuss such an extension of those ideas. "While the difficulties would be great in applying them to the rivers of Africa, on account of the lack of adequate knowledge respecting them, yet they were not insurmountable." The navigation of the Congo could, in the opinion of the British Government, be regulated by an "international commission." Such an institution Great Britain would cordially approve. "But the situation of the Niger is entirely different. The establishment of such a commis-

sion on that river would be impracticable, for the reason that it was insufficiently explored. The lower part was, moreover, quite under the control of Great Britain. She was amply able to regulate its navigation while adhering to the principle of its free navigation by a formal declaration." He then asked that the subject of the navigation of the Niger be considered separately from that of the commerce of the Congo.

The second session of the Conference was held on the 19th of November. The opening address was made by the Marquis de Penafiel, the representative of Portugal. When one remembers the trouble which England had in forcing Portugal to abide by the provisions of the Declaration of Vienna (1815), and the way in which Portugal insisted that she might carry on the trade within her own dominions in Africa, the declarations made in this speech are amusing. The Marquis asserted the duty of Portugal to mediate, as a riparian power, in the regulation of rights to be acquired by the various powers in the Congo Country, and declared that Portugal was glad to affirm anew, what it had already declared upon many occasions, its complete adhesion to the principles of the freedom of commerce and navigation, applied to the basin and mouths of the Congo. "Many acts," he said, "ancient as well as modern, demonstrate that it has not ceased to defend them on the banks of the Congo. The Portuguese Government hopes to see realized the desire expressed in the Conference, that the native population may profit as much as possible by the extinction of the slave-trade and slavery, the two great obstacles to the progress of civilization upon the coasts of Africa. You are aware, gentlemen, that Portugal has introduced the germs of civilization in Africa; you know also the sacrifices that it has imposed upon itself in order to arrive at the total suppression of the slave-trade in those territories."

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<sup>1</sup> Protocol No. 2. For an account of the existing slave trade, see "Slavery and the Slave Trade in Africa." H. M. Stanley, Harper's Black and White Series, 1893.

After addresses by the delegates of Italy and the United States, the Conference proceeded upon the work as indicated in the programme, taking up the question of freedom of commerce in the basin of the Congo. Should the term be restricted to the geographical basin, or should it be taken to mean the commercial area affected by the river? In order to settle which should be meant, a committee was appointed, composed of the delegates representing the powers most directly interested, those of Germany, Belgium, Spain, France, Great Britain, Holland, and Portugal, with the United States. Mr. Kasson made the proposal in this committee that the commercial area should be adopted. Mr. Stanley was heard as an expert in support of Mr. Kasson's idea, with the result that it was adopted as the sense of the committee and ratified by the Conference.

As urged by Mr. Stanley, the main reason for this extension of the area of commercial freedom beyond the basin of the Congo was that, owing to the many obstructions in the course of the river, such as cataracts and rapids, a land communication between the Upper and Lower Congo would be necessary. If the river traffic was to be free, trouble might occur on account of transit dues imposed by non-riparian powers. At the meeting of the commission which was to consider this question, Mr. Stanley noticed a "curious reluctance to speak, as though there was some grand scheme of State policy involved."<sup>1</sup> The limits of the commercial area were stretched beyond the geographical basin.

The zone which should be subjected to the régime of commercial liberty was to be bounded on the north by Sette-Camma on the coast of French Congo. The line was to follow the course of the small river which debouches at Sette-Camma, and following it to its source, to be the same as the limit of the geographical basin of the Congo, avoiding the basin of the Ogowé River, which runs through French Congo into the Atlantic. The coast of the Atlantic should

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<sup>1</sup> Stanley, II., 394. For his speech on the subject before the commission, see Appendix to Vol. II., "Congo."



be within this area from Sette-Camma ( $2^{\circ} 30'$  south latitude) in the north to the mouth of the Logé in the south ( $8^{\circ}$  south latitude). This would include a part of the French possessions, a part of the Portuguese colony of Angola, and the mouth of the Congo. The southern limits were to be the Logé River to its source, and thence eastward, coinciding with the geographical basin of the Congo. There was much discussion in locating the eastern boundary of the commercial area, but it was finally decided, upon Mr. Kasson's suggestion, to extend it to the Indian Ocean, "under the reservation of the rights of the sovereignties existing in this region." It was decided by the General Act that the zone should extend on the coast of the Indian Ocean from 5 degrees north latitude to the mouth of the Zambesi River (in about  $19^{\circ}$  south latitude).<sup>1</sup> The northern boundary was to extend along the parallel of 8 degrees north latitude to its intersection with the geographical basin of the Congo; and on the south the limit was to follow the Zambesi to a point five miles above the mouth of the Schiré, and onwards along the watershed between the Zambesi and Lake Nyassa to that between the Zambesi and the Congo.

The delimitation of the commercial area of the Congo decided, the Conference proceeded to the consideration of the regulations by which commercial freedom in this territory might be preserved. Germany proposed that all import and transit dues, save those absolutely necessary for the maintenance of navigation facilities, be absolutely interdicted. The Italian representative preferred that taxes be allowed which should correspond to a service rendered, and to limit these he proposed that the Conference fix a maximum of two to four per cent. ad valorem, beyond which they could not pass. It was objected to this proposition that such an attempt on the part of the Conference would be in excess of its competence; it could not fix in advance remuneration for services to be rendered or works to be

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<sup>1</sup> Report of Committee, Annex to Protocol 2.

executed. The German proposition was more in accord with the spirit of the assembly, so that with a few alterations it was adopted. The declarations regarding freedom of commerce in the commercial basin of the Congo are as follows:<sup>1</sup>

“All flags, without distinction of nationality, shall have free access to the whole of the coast-line of the territories above enumerated, to the rivers there running into the sea, to all the waters of the Congo and its affluents, including the lakes, and to all the ports situate on the banks of these waters, as well as to all canals that may in future be constructed with intent to unite the watercourses or lakes within the entire area of the territories described in Article 1. Those trading under such flags may engage in all sorts of transportation and carry on the coasting trade by sea and river, as well as boat traffic, on the same footing as if they were subjects.

“Goods, of whatever origin, imported into these regions, under whatsoever flag, by sea or river, or overland, shall be subject to no other taxes than such as may be levied as fair compensation for expenditure in the interest of trade, which, for this reason, must be equally borne by subjects and by foreigners of all nationalities. All discriminating duties on vessels, as well as on merchandise, are forbidden.

“Merchandise imported into those regions shall be exempt from import and transit duties.”

This last declaration by the Conference was strongly attacked by Baron de Courcel, the French delegate, who observed that the powers of Europe should not deprive the native chiefs, for an indefinite period, of the right to impose taxes on imports, a right common to all nations. Doubtless the perpetual abolition of import taxes would discourage the development of a new State, which might be founded in these territories, and more than encroach upon the supposed rights of the native chiefs, many of whom had already

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<sup>1</sup> Protocol 3. Session of 27th Nov., 1884. Provisions 1-4, inclusive, of the General Act.

put themselves under the protection and guidance of the African Association. Acting on De Courcel's suggestion, a special committee reported in favor of limiting the prohibition of import duties to twenty years, and this view was concurred in by the Conference. "That the powers reserve the right to decide, after a period of twenty years, if this exemption from import duties shall be maintained or not."<sup>1</sup>

The next subject which occupied the attention of the Conference was that of commercial monopolies. The draft of a declaration in regard to this was submitted to the assembly. This read as follows: "No power who exercises or shall exercise the right of sovereignty in the aforesaid territory can concede, monopolize or grant privileges of any kind on commercial matters. Foreigners shall enjoy indiscriminately the same rights as native citizens." Mr. Sanford, the associate delegate of the United States, proposed to add a paragraph to this which might allow the grant of a monopoly to a company for the construction of a railroad along the Congo River, between the upper and lower courses. Such a monopoly was necessary, according to Mr. Sanford, to ensure the erection and maintenance of such a road to facilitate commerce in the Congo basin. The proposition was not enthusiastically received by the Conference, and Mr. Kasson, evidently fearing that such a proposal might be construed as coming from the American Government, was quick to say that the proposition was advanced by the American delegate simply with the object of bringing before the Conference the subject of improvements in navigation, and that therefore the Government of the United States was not bound in regard to details of the project. It is interesting to note that the proposition was brought forward by Mr. Sanford and not by Mr. Kasson, for while Mr. Sanford was accredited as an associate delegate of the United States, he was in close relations with the African Association, as one of its executive committee.

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<sup>1</sup> Annex to protocol 14. See Art. 4 of Gen. Act.

Such an expression on the part of Mr. Sanford may be traced directly to the International Association, for Mr. Kasson disavowed in its regard the authority of the United States. The proposition was not agreed to and was not included in the final act.

The Conference turned next to the consideration of regulations which should guarantee freedom of worship and the gradual extinction of slavery in the territory of the Congo Basin. The rough draft of the declaration, proposed at the beginning of the Conference by Prince Bismarck, provided that all powers which might exercise rights of sovereignty in the area described above should bind themselves to concur in the suppression of slavery and particularly of the slave-trade. In addition to this, the powers should "give aid to missions and to all institutions for the instruction of the natives," that they might be made to "understand the advantages of civilization." The Italian representative proposed to add that no discrimination should be made on account of denominational differences; that "the same protection be extended to Christian missionaries of whatever denomination." Such a proposal as this found an opponent in the representative of Turkey. In admitting to the councils of the Christian nations of Europe the representative of a State founded upon a religion foreign to the spirit and purpose of Christianity, international law changed its character greatly: it had to broaden to be binding on non-Christian powers. For this reason there is nothing surprising in the amendment offered by the Sultan's delegate, Said Pacha. He proposed that, instead of the provision refusing to allow any discrimination between Christian denominations, the decision of the Conference should be "in favor of the exercise of all religions without distinction of creeds." This suggestion was adopted by the Conference.<sup>1</sup> Such a declaration as this might become of transcendent importance to a future Christian State in the Congo Valley, in view of the active

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<sup>1</sup> Article 6 of the General Act, Protocol No. 3.

proselyting policy of the Mohammedan faith, a faith which includes the political as well as the religious idea.<sup>1</sup>

The declaration of the draft regarding the slave-trade is to be especially noted. The Congress of Vienna had put the slave-trade under the ban of civilized Europe; the Congress of Verona declared it (November 20, 1822) culpable and illegal, "a scourge which has long desolated Africa, disgraced Europe and afflicted humanity." The trade, as then understood, had become extinct. No European power dared allow its subjects to continue the slave-trade by sea. But an institution, equally iniquitous, was devastating Africa: the slave-trade by land. It was necessary that steps be taken to stamp out this form of the traffic, else Equatorial Africa would never come within the pale of civilization, nor could it prosper commercially. As the rough draft seemed to be too lukewarm in its condemnation of this crying evil, Mr. Kasson desired to make the declaration more forcible, proposing that the territories of the signatory powers could serve neither as a market nor way of transit for the slave-trade, and that each power should bind itself "to employ all the administrative means within its power to put an end to this traffic and punish all who engage therein." This proposal received the approval of the Conference and was incorporated into the General Act.

Freedom of commerce in the Congo Basin having been assured, with condemnation of the slave-trade, the Conference next busied itself with more precise regulations by which the provisions respecting the Congo and Niger might be carried out.

After much discussion, two acts were drawn up, one for the navigation of the Congo, the other for the Niger. For the former an International Commission was to be insti-

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<sup>1</sup> "The distribution of Mohammedanism is of importance, as it is a factor to be taken into account in the attempt to spread European influence in Africa. It is something more than the spread of religion; Islamism brought with it, almost without fail, political organization, a certain amount of civilization, commercial activity, and the establishment of slavery as an institution." Keltie, p. 31.

tuted, which should execute the provisions of the General Act. This Commission was to be composed of one delegate from each of the signatory powers, though there was no necessity that each government should appoint a delegate. Each member was to be paid directly by his own Government, and was to be inviolable in the exercise of his functions. This Commission, to be instituted as soon as five delegates should be appointed by the signatory powers, was to have power to decide on works necessary for the maintenance of navigation, to fix pilotage tariffs, and to administer the income gained therefrom, and, finally, to superintend the quarantine. To aid in the execution of these duties, the Commission could call upon war vessels of the signatory powers, unless in particular instances the commanders of those vessels be instructed otherwise. By a two-thirds vote, the Commission might be empowered to negotiate a loan, the proceeds of which should go to the improvement of navigation. It was further provided that the Act of Navigation should remain in force in time of war, so that "all nations, whether neutral or belligerent, shall always be free, for purposes of trade, to navigate the Congo and all its branches," as well as on the roads, railways and canals which might be built in the future.<sup>1</sup>

Notwithstanding the fact that the Commission was "instituted" by this General Act, it never had any existence, for the guarantee of the governments represented in the Commission was not given to any obligations which might be incurred. "It is understood that the governments represented in the Commission shall not in any case be held as assuming any guarantee, or as contracting any engagement or joint liability respecting the said loans, unless under special conventions concluded by them to this effect."<sup>2</sup> The Commission was endowed with prerogatives enough, but it had not the means to act and to live.<sup>3</sup> By this declaration

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<sup>1</sup> Chap. IV., Gen. Act, Protocols IV-IX.

<sup>2</sup> Art. 23, ch. IV., Gen. Act.

<sup>3</sup> G. Rolin-Jacquemys in *Rev. de Droit Int.*, 1889, p. 185.

of the Conference, without the guarantee of one or more governments, no money could be raised by the International Commission, relying for its revenue on merely the tariffs of pilotage and other taxes provided by the General Act. No money could be borrowed without a guarantee, and with but a hope of extensive commerce in the future. The Conference was doubtless aware of the uselessness of such a Commission, apparently with great powers, in reality having none,<sup>1</sup> but, as it often happens in such assemblies, the majority agrees on the solution of a difficulty engaging each one to a minimum of responsibility, while losing sight of the desired end.

The work of improving the Congo navigation, intended as the charge of the International Commission, was afterwards taken up by the authorities of the Congo Free State. That this might be done was doubtless foreseen by the members of the Conference, for it was shown that the authority, attributed to the International Commission in regard to the superintendence of the application of the principles of commercial liberty, could only be exercised in territories where no regularly established sovereign authority existed.<sup>2</sup> By the time that the General Act had been signed and ratified by the various powers, the Congo Free State had been recognized by the same powers as exercising sovereignty in the waters of the Congo.

One of the most important questions decided by the Berlin Conference was in reference to new acquisitions of territories on the coasts of Africa. This was the third subject to be considered, as authorized in the preliminary programme. What formalities should be observed in order that new occupations in Africa might be considered effective? The outline of a declaration regulating these formalities was presented by the German delegate at the session of January 7 (Protocol No. 7), but discussion upon it

<sup>1</sup> Protocol 5 and Annex, containing report of Sub-commission.

<sup>2</sup> Observations of Sir Edward Malet, session of Dec. 18, 1884, Protocol 5, General Act, ch. I., Art. 8.

was postponed until the following meeting, held January 31. A draft of a declaration proposed by a sub-commission appointed for the purpose was presented to the Conference. The first paragraph of this draft was adopted without discussion. It provided that when a power took "possession of any territory on the coasts of the African continent outside of its present possessions, or that, having had none up to that time, it should acquire any (and likewise any power that might assume a protectorate there), it was necessary that a notification of the fact be addressed to the other signatory powers, in order to enable them, if need be, to make good any claims of their own."<sup>1</sup> In order to keep this declaration from having too general a bearing, the plenipotentiaries of Russia, France and Turkey desired that it be well understood that these formalities should only refer to new occupations in Africa, or that it should not be necessary for powers occupying new territory elsewhere to make a declaration of the fact. It was emphasized, moreover, that this declaration of the Conference should not be in the least retroactive, but should refer only to future occupations. Notwithstanding the declaration of the regulation was confined to Africa, the German Government tried later, in 1885, to have it extended elsewhere. When a German corvette seized one of the Caroline Islands claimed by Spain, Germany said that the seizure was just, basing its pretensions upon this article of the Berlin Act. Spain protested in declaring that the decisions of the Berlin Conference were binding upon occupations in Africa alone.<sup>2</sup> Even as regards Africa we shall see that this declaration is of little force, owing to the fact that no power can give an exact delimitation of newly acquired territory, nor can it determine just what are the territories of a savage tribe over which it "assumes a protectorate." Then, too, as was objected by the English ambassador at the time, most of the coast-line had already been occupied.

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<sup>1</sup> Art. 34, Gen. Act.

<sup>2</sup> *Rev. de Droit Int.*, 1886, p. 266.



In addition to the publicity necessary for the occupation of new territories, it was necessary that the occupation be not merely nominal, but actually effective. Some exercise of sovereign power must accompany every new occupation. What formalities should prove that sovereignty could be exercised by the occupying power? With little debate the Conference declared that when a new territory was annexed by one of the signatory powers, sufficient authority should be maintained to protect existing rights, together with freedom of trade and of transit.<sup>1</sup> The American delegate, Mr. Kasson, desired that the term "existing rights" be made more emphatic, and that those of the native tribes be especially taken into account. He declared that as modern international law has followed a line leading to the recognition of the rights of native tribes to dispose freely of themselves and of their hereditary territory, "the Government of the United States would gladly adhere to a more extended rule to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression." As might be expected, this proposition was not greeted with much enthusiasm, and the president remarked that as it touched upon a delicate question, the Conference would hesitate to express an opinion upon it. A Russian remarked afterwards (F. de Martens, in *Rev. de Droit Int.*, 1886, "Le Conference de Congo") that it was far from being an idle question if one remembers that civilized nations rarely take account of the incontestable rights of native tribes, and frequently take their lands by force or fraud. "The conduct of the Government at Washington towards the Indians is not free from reproach, when it systematically seizes their lands, often without any compensation whatever."

At an early session of the Conference, Mr. Kasson had proposed that the entire conventional basin of the Congo be

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<sup>1</sup> Art. 35, Gen. Act, Protocol No. 8.

declared neutral, so that freedom of commerce might be assured in time of war as well as peace. While many of the delegates expressed themselves in favor of such a declaration, it was objected that, in a country where no sovereignty was exercised, it would be impossible to maintain the duties of neutrality. The question was not decided until the last session of the Conference,<sup>1</sup> though many projects regarding it had been offered. By that time the International Association of the Congo had been recognized as a power by all, save one, of the governments represented at the Conference. Immediately after the session was opened, the president of the Conference, Prince Bismarck, read a letter from Col. Strauch, the secretary of the Association, in which this fact was officially communicated to the Conference. Addresses followed from the various delegates, in which they, on behalf of their respective countries, welcomed the Association "on its entry into international life."

The sovereignty in the basin of the Congo was now an accomplished fact, so that a discussion of neutrality might be safely made to apply to the territories in the "Conventional Zone." A commission had been appointed at the session of January 31 (Protocol No. 8) to draw up a scheme of neutrality, and this was laid before the assembly soon after the addresses of welcome to the International Association had been delivered.<sup>2</sup> The commission decided that the signatory powers should engage themselves to respect the neutrality of the territories, and parts of territories, belonging to the various powers as long as the *duties* of neutrality were maintained. Each power having possessions in the conventional area could use its own discretion in declaring its territory neutral. This option was extended from the signatory powers to all those which might in the future acquire sovereignty in the free-trade area. No limit was placed upon the declaration of neutrality: it could be either temporary or perpetual. This was done largely in reference

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<sup>1</sup> Meeting of Feb. 23, 1885, Protocol IX.

<sup>2</sup> Report of Commission, Annex 3 to Protocol No. 9.

to the International Association, which, it was thought, would declare itself perpetually neutral.<sup>1</sup> It was decided, furthermore, that if any of the signatory powers became involved in war, it should be the duty of the other signatory powers to propose to it a declaration of the neutrality of its possessions in the free-trade area. If it did so, the other belligerents would be bound to respect the rights of neutrality (Chap. 3, Art. 11, of Gen. Act). As a further attempt to maintain the commercial freedom at all times, the powers bound themselves to have recourse to mediation by one or more friendly powers before an appeal to arms (Chap. 3, Art. 12, of Gen. Act).

Mr. Kasson desired that a stipulation be added, making arbitration necessary; but as this might be considered derogatory to the sovereignty and independence of States, its adoption was left to the discretion of the interested powers. Instead of mediation, the powers reserved to themselves the option of having recourse to arbitration.<sup>2</sup>

The propositions regarding neutrality, which were embodied in Chapter 3 of the General Act, completed the work of the Conference as it had been outlined in the invitation of the German Government. Little was left to be done save to determine in what form the resolutions of the Conference should be: whether the conclusions be enacted in a treaty or in a declaration containing the series of acts. There was some objection to the former plan, particularly on the part of Mr. Kasson, so that the work of the Conference appeared as a "General Act," with provisions for amendment and change.<sup>3</sup> By common consent of the signatory powers, "such modifications and improvements" might be introduced as experience might show to be expedient. Other powers not represented at the Conference could, if they so desired, adhere to the General Act by a separate instrument,

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<sup>1</sup> On the 1st of August, 1885, the Congo Free State notified the other powers that it so declared itself.

<sup>2</sup> Protocol 9.

<sup>3</sup> Chapter VII., "General Dispositions," Annex 3 to Protocol 9.

by which they should accept the obligations and advantages stipulated by the original instrument (Art. 37). Each power was given a year in which to ratify the work done by the Conference, but the representatives of each government pledged themselves that no steps should be taken by their governments contrary to the spirit of the act (Art. 38).

Such in the main was the work of the Berlin Conference as shown in the protocols and embodied in the General Act. The programme outlined in the invitations addressed to the various powers by the German Government had been carried out, and rules had been laid down which should regulate European activity in Equatorial Africa. The General Act had its bearings upon the commercial, political and humanitarian development of Africa; but what might well be said to have been the main object of the Berlin Conference had not been disclosed in the invitation, nor had it a place in the General Act. When the Conference was convened, most of the European powers had a foothold in Africa; the attention of each one was directed towards the center of the continent. There it was that trouble would appear, when the various governments, enlarging their colonial possessions bit by bit, and stretching their "spheres of influence" farther and farther from the coast, would come together in one grand clash at the center of the continent. Once neutralize the central portion of the African continent and this trouble would be arrested, at least as long as the state of perfect neutrality lasted. So that, while the evident purpose of the German Government in calling the Conference was commercial, there was a strong undercurrent which was in the main political. It has been seen that the International African Association, starting with purely philanthropic and humanitarian principles, developed into the Comité d'Études (which in turn was changed into the International Association of the Congo), with purposes of a political nature. This association was the "administrator of the free native States," as it declared, but more practically it owned the ter-

ritory, and as such held the center of the continent, made neutral by the Berlin Conference.

The work of the Conference, then, was to solidify and to strengthen the rights of sovereignty of the International Association of the Congo, rights which had been recognized by the United States some six months before. It has been seen that on the 22d of April, 1884, the United States recognized the International Association of the Congo as a friendly power. This action of the United States was characterized at the time as premature, and well might it have been so considered, for it was quite out of the ordinary policy of the State Department to make haste in recognizing a hitherto non-political organization as a sovereign over territories, the ownership of which had been disputed for more than a century. The nearness of the dates of the *Anglo-Portuguese* treaty and that between the Congo Association and the United States gives a hint that some pressure had been brought to bear upon the State Department by which the Congo Association might retrieve its lost position by receiving political recognition. The reasons for the ratification of this treaty are for the most part largely sentimental.<sup>1</sup> In his annual message, the President had referred to the future of the Congo Valley, and, with the advice and consent of the Senate, had negotiated a treaty with the Congo Association, "without prejudgment of any existing territorial claims." The fact that Henry M. Stanley, a former American citizen, had discovered the country, and that "more than one-tenth of our population is descended from the native races of Africa," were among the reasons put forth for the American interest in the plans of the Congo Association. The extension of American commerce to the Congo Valley was a third argument urged, though that commerce was insignificant. It is to be remarked that the negotiator of this treaty for the Association was Henry S. Sanford, once minister of the United States to Belgium and

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<sup>1</sup> Senate Rep. No. 393, 48th Cong., 1st session.

an associate delegate to the Berlin Conference, representing the United States.

On the next day after the treaty with the United States had been promulgated the Association took another step, that it might be strengthened in the face of the proposed Anglo-Portuguese treaty, which had done so much to render its work useless. Recognition by the United States had been secured, the assistance of France was gained by the following agreement:

“The International Association of the Congo and France, April 23, 1884. The International Association of the Congo, in the name of the free stations and territories which it has established in the Congo and in the valley of the Niadi-Kwilu, formally declares that it will not cede them to any power under reserve of the special conventions which might be concluded between France and the Association, with a view to settling the limits and conditions of their respective (spheres of) action. But the Association, wishing to afford a new proof of its friendly feeling for France, pledges itself to give her the preference, if, through any unforeseen circumstances, the Association were one day to realize (alienate) its possessions.”<sup>1</sup> France, in return, promised “to respect the stations and the territories of the Association.”<sup>2</sup> This creation of a reversionary interest in favor of France was doubtless necessary as a means of securing the co-operation of that power in opposing the treaty which was to give Portugal the sovereignty over the mouth of the Congo; but it was a step that was regretted as soon as the Association was on a firm basis, for more than one attempt was afterwards made by which this reversion might be rendered null and void. It was doubtless made in a moment of irritation against England, in the face of a pressing danger; but once the State was established it was soon repented of.

Little change was made in the status of the Association

<sup>1</sup> Stanley, II., 388.

<sup>2</sup> Congo Belge, 174; Keltie, p. 210.

until the time for the assembling of the Conference at Berlin. A few days before the opening of that assembly (Nov. 8, 1884) Germany recognized the flag of the Association as that of a friendly power, with the proviso that, if all or any part of the Association's territory should ever be granted away, the obligations and rights granted by the Association to the German Empire and its subjects should remain intact and inviolate. These obligations taken by the Association were to exempt merchandise from import and transit duties, and to give favor and protection to German commercial interests as to "those of the most favored nation." In return, Germany recognized the flag of the Association and "the frontiers of the territory of the Association and the new State" which was to be created.

When the Berlin Conference opened, therefore, the International Association of the Congo had been recognized by three powers. During the two months that intervened before the promulgation of the General Act, the very important and necessary negotiations were to be perfected by which the Association was to be recognized by all the powers. The conflicting claims of France and Portugal with the Association must be settled and an approximate delimitation of the territory belonging to the Association be made, before the new State could emerge. With these ends in view, the representatives at the Conference were engaged in a matter quite as important as that of drawing up the general regulations embodied in the final Act, so that what might justly be called the main business of the Conference was not hinted at in the protocols of the Conference until all territorial differences between the various powers and the Association had been adjusted. But one of the representatives at the Conference, that of the Sultan, was unacquainted with the purpose and intent of the Congo Association, and with this exception all had obtained power to recognize the Association after the many territorial ques-

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<sup>1</sup> Convention between German Empire and International Association of the Congo, Nov. 8, 1884.

tions had been settled. On the 16th of December Sir Edward Malet, acting for Great Britain, recognized the Association as a friendly government, and declared its sympathy with, and approval of, the benevolent purposes of the Association. In this Convention the Association bases its claim to sovereignty upon the treaties made by it with the native chiefs. Its territories, therefore, were for the "use and benefit" of the Native Free States, the Association being entrusted with the management of these interests. The obligations of the Association toward Great Britain were the same as those noticed in the treaty with Germany, with the addition that the Association and Free States should do all in their power to prevent the slave-trade and to abolish slavery.<sup>1</sup> As slavery was, and is, a fundamental idea in the government of these "native Free States," obviously little could be done on their part to abolish this institution; but Great Britain was able to declare the principle for which she had been contending with Portugal during so many years.

Recognition by Italy (December 19, 1884), Austria (December 24, 1884), The Netherlands (December 27, 1884), and Spain (January 7, 1885), followed with treaties similar to those negotiated with Germany and Great Britain, including as well a provision condemnatory of slavery. More difficulty was experienced by Col. Strauch, who acted for the Association, in arranging a treaty with France, for it entailed a settlement of the territorial claims based on the work of De Brazza north of the Congo. The negotiations between France and the Association were long and laborious. They were begun in Berlin and transferred to Paris late in December. About the middle of January the work was returned to Berlin and completed on the fifth of February. By the treaty drawn up on that day, the claim of France to the region north of the Congo was allowed, giving to her a number of stations established by the officers of

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<sup>1</sup> Dec's bet. of H. B. M. and the Int. Assoc. of the Congo. Dec. 16, 1884.



the International Association (*e. g.* Strauchville, just north of the Congo). France agreed to act as a mediator between the Association and Portugal, promising to use her good offices to secure proper concessions from the latter. The Association could not, unless it assented to its own destruction, concede the limits claimed by France without recognizing Portuguese pretensions upon the right bank.<sup>1</sup> With France as a mediator, the last were acceded to, the Association holding the territory for several hundred miles on the north bank from the coast to Manyanga, "subject to the arrangements to be made between the International Association of the Congo and Portugal as to the territories situated to the south of the Chiloango"<sup>2</sup> (Art. 5 of the Convention, signed at Paris, February 5, 1885).

The French Government recognized the neutrality of the Association's possessions "conditionally upon discussing and regulating the conditions of such neutrality in common with the other powers represented at the Berlin Conference." What the character of this neutrality was to be has already been discussed. The interesting point to be noticed in the French treaty is that no reference is made to the Acts of the Association which created a reversion in favor of France. This should have been annulled by the treaty or by the Acts of the Conference, if possible, but it was not, and the question of the reversion had doubtless much to do with the prolonged negotiations which were gone through before the promulgation of the treaty. On the day that

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<sup>1</sup> Le Congo Belge, 173, from Banning.

<sup>2</sup> The Chiloango is a small river flowing almost parallel to the Congo, emptying into the Atlantic ocean at a point about one degree north of the mouth of the Congo. As is shown in the convention between Portugal and the Association, Portugal was to hold a small part of this territory south of the Chiloango along the coast as far south as Vermillion Point and inland for about thirty miles. This territory included the town of Kabinda, made historic in the eighteenth century when the Portuguese forts were demolished by a French vessel. The Chiloango thus became the boundary between the Portuguese colony and French Congo and between the Congo Free State and French territory.

France recognized the Association, Russia did the same;<sup>1</sup> and on the 10th of the same month Norway and Sweden agreed to consider the Association as a friendly power.<sup>2</sup>

The recognition of the Association as a territorial power by Portugal was most important, not only to the contracting parties, but to the other powers as well; for, by this treaty, the disputed questions of the extent of Portuguese sovereignty were settled. The discussions begun a century previous between France and Portugal were now to be ended. Portugal asserted her historic claim to the Atlantic coast as far north as the Chiloango, including the mouth of the Congo. This was the same extent of coast-line which Great Britain agreed to recognize as Portugal's in the treaty of 1884. The Association had wished, on the other hand, to hold a part of the south bank of the Congo. Through the mediation of Baron Courcel, acting for France, a compromise was effected, in which Portugal was given a small amount of coast-line around Cabinda, and all the territory from the south bank of the Congo to her old colony of Angola. Along the course of the Congo, Portugal received the south bank for about one hundred and fifty miles. Portugal's retention, or receiving, of Cabinda was a concession to her old claim to all the coast, but the giving of the mouth of the Congo to the Association showed that her rights were not absolute. When the territorial claims had been adjusted, Portugal recognized the neutrality of the Association's possessions as France had done.<sup>3</sup> It was agreed that a commission, representing the two contracting parties, should locate the exact limits of the possessions of each.<sup>4</sup>

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<sup>1</sup> Convention between the Russian Empire and the International Association of the Congo, signed at Brussels, Feb. 5, 1885.

<sup>2</sup> Convention between the United Kingdoms of Sweden and Norway and the Int. Assoc. of the Congo, signed at Berlin, Feb. 10, 1885.

<sup>3</sup> Additional agreements in regard to boundaries were made by Portugal and the Congo Free State in February, March and May, 1891.

<sup>4</sup> Convention between Portugal and the Int. Assoc. of the Congo, signed at Berlin, February 14, 1885. It should be noted that Portugal, by the recent addition of a few posts on the coast near Cabinda, claimed an effective occupation.

After Denmark had recognized the Association, February 23, 1885, Belgium and the Association exchanged declarations, and the recognition of the powers at the Conference had been secured. Belgium as a neutral power was the last to recognize the Association, and then not by a treaty, but by a declaration. The increase in political rights, which recognition allowed the Association to maintain, is shown by a comparison of these declarations with earlier ones, such as that of Great Britain. On the 16th of December, 1884, the Association appears as the administrator of territories for the use and benefit of the native Free States. On the 23d of February the statement is made by the Association that by treaties with "the legitimate sovereigns in the basin of the Congo . . . vast territories had been ceded to it, with all the rights of sovereignty, with a view to the creation of a free and independent State." By this time the political existence of the Association had been secured. From a mere administrator, acting for "sovereigns," it had itself become a sovereign power. This, then, was the great work which was accomplished by the members of the Conference quite outside the Conference hall.

The recognition of the Association with the individual powers was followed by the recognition of it by the Berlin Conference as a whole, when, at the session of February 23, the following letter from Col. Strauch was read by the acting president, Busch: "Prince,—The International Association of the Congo has successively concluded with the powers represented at the Conference of Berlin (with one exception) treaties which contain among their clauses a provision recognizing its flag as that of a friendly State or Government. There is every reason to hope that the negotiations entered into with the remaining power will shortly terminate favorably. I am carrying out the intentions of His Majesty the King of the Belgians, acting as the founder of this Association, by bringing this fact to the knowledge of your Most Serene Highness. The meeting and deliberations of the distinguished assembly, sitting at Berlin under your high

presidency, have materially contributed to hasten this happy result.

"The Conference, to which it is my duty to render homage, would, I venture to hope, consider the accession of a power whose exclusive aim is to introduce civilization and trade into the center of Africa, as a further pledge of the fruits which its important labors must produce.

"I am, &c.,

(Signed)

"STRAUCH.

"Berlin, February 23, 1885.

"To his Most Serene Highness Prince Bismarck,  
President of the Conference of Berlin."

Herr Busch then spoke a few words of welcome to the Association, in which he wished that "the most complete success might crown an enterprise which might so practically assist the views which directed the Conference" (Protocol No. 9). The other representatives similarly expressed the good wishes of their respective countries toward the Association. Replies to these speeches were made by the Belgian delegates, representing the founder of the Association. Among other things it was said that "the Acts of the Conference give practical effect to the bold and generous ideas conceived by His Majesty. The Belgian Government and nation will, therefore, gratefully adhere to the work elaborated by the high assembly, thanks to which the existence of the new State is henceforth assured, while rules have been laid down by which the general interests of humanity will profit."

In order to give greater importance to the diplomatic negotiations of the Association with the various governments, the conventions and declarations made by it were annexed to the protocol of the Conference.<sup>1</sup>

During the last session of the Conference, February 26, Bismarck, as president, communicated to the delegates the fact that the International Association, acting in its sover-

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<sup>1</sup> Annex to Protocol No. 9.

eign capacity, adhered to the General Act of the Conference, as was allowed by Article 37 of that instrument. Leopold, as the founder of the Association, had given full powers to Col. Strauch to sign the "General Treaty" adopted by the Conference of Berlin. By a declaration of the Association, dated at Berlin, the 26th of February, its adhesion to the General Act was proclaimed. Accompanying the declaration was a letter from Col. Strauch to Prince Bismarck, in which he said that the "International Association of the Congo will view the favorable reception given to its request as a fresh proof of the friendly attitude of the powers towards a work destined by its origin, by the conditions of its existence, and by its object, to support the fulfillment of the generous view of the Conference."

The significance of this event is seen when the language of Article 37 of the General Act is considered. "The powers that have not signed the present General Act shall be free to adhere to its provisions by a separate instrument." When the Berlin Conference allowed the International Association to ratify the act by a separate instrument, it formally transformed the International Association into a sovereign power. Recognition by the separate powers was a necessary condition precedent to this formal announcement by the Conference. The act of the International Association was the formal declaration of its purpose to take a place as a sovereign power. The reception of the act by the Conference sanctioned this declaration. Prince Bismarck gave expression to this idea in a speech which followed the reading of the act of the Association. "I believe," he said, "that I express the views of the Conference when I acknowledge with satisfaction the step taken by the *International Association* of the Congo and acknowledge their adhesion to our decisions. The new *Congo State* is called upon to become one of the chief protectors of the work which we have in view, and I trust it may have a prosperous

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<sup>1</sup> Strauch to Bismarck, February 26, 1885, inserted in Protocol No. 10.

development, and that the noble functions of its illustrious founder may be fulfilled." The change of the title which Bismarck gave it shows its change of status, though the name of the Association was not formally changed until the first of August, 1885.

This act of the Conference transforming, at a blow, an association into a power was, very fittingly, the last work of the Conference. The words of Prince Bismarck, considering the circumstances in which they were said, "assumed the proportions of a truly international investiture."

It must not be supposed that the régime adopted for the Congo by the Conference of Berlin was arranged wholly by the diplomats assembled. Many of the ideas there recognized had been proposed by various distinguished authorities in international law, and it may be that to them should the credit be given of having started the discussion as to what measures might be taken to render the partition of Africa among European nations peaceable and in accord with recognized principles of international law.

As early as 1878 M. Gustave Moynier, the president of the Red Cross Society, drew the attention of the Institute of International Law, at its Paris session, to the subject of the conflicts which might arise on the Congo as a result of the colonial aspirations of the powers. The Institute made the question a special order, and two of its members, M. de Laveleye and Sir Travers Twiss, were charged with the work of preparing reports upon the feasibility of some plan by which conflicts might be avoided and the Congo country be opened to civilization by peaceful means. M. Moynier thought that "as the ambulances of the Red Cross Society had been recognized as absolutely neutral by twenty-three different States, the stations and works of the International African Association might be made so too." "The African Association is in reality another 'Red Cross,' choosing for its field of action, not the battlefields of

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<sup>1</sup> G. Rolin Jacquemyns, *Rev. de Droit Int.*, 1889, page 170.

Europe, but the unexplored regions of Africa. It is an institution for the propaganda of civilization, such as was the Order of Malta, or, even more, the Teutonic Order, which in the Middle Ages carried civilization among the barbarous peoples about the Baltic."<sup>1</sup>

As a result of his investigation, M. de Laveleye expressed himself more than once in favor of an international conference to determine the legal position of the lands held by Europeans on the Congo. In an article in the *Contemporary Review* for 1883<sup>2</sup> he proposed that the States of Europe, together with the United States of America, should proclaim the permanent neutrality of all the navigable course of the river and its adjacent territories. He recommended, besides, that entire freedom of navigation be proclaimed, and as a means of preserving this an International Commission be instituted, similar to that of the Danube, in existence since 1856.<sup>3</sup>

The English jurist, Sir Travers Twiss, did not hold the same views as the Belgian scholar.<sup>4</sup> He considered it impossible to apply the principle of permanent neutrality to territory which was, for the most part, still undiscovered and the limits as yet unknown. The idea of an International Commission was very desirable, he thought, applied to the Lower Congo as the only means by which freedom of navigation could be preserved. The upper and middle course of the Congo might be kept free by a proclamation on the part of each power. "International conventions employ the word 'neutralization' in its application to territorial waters in but one sense; that, in the waters neutralized by an international convention, the entry of armed

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<sup>1</sup> Laveleye in *Rev. de D. Int.*, 1883, p. 257.

<sup>2</sup> Vol. 43, p. 767; also in *Rev. de Droit Int.* See, too, *Rev. de Belgique*, December 15, 1882.

<sup>3</sup> Laveleye evidently did not recognize, therefore, the claims of Portuguese sovereignty over the Congo.

<sup>4</sup> See *Rev. de Droit Int.*, two articles, Vol. XV., Vol. XVI. "*La Libre Navigation du Congo.*"

ships is prohibited to all the States who are signatory to the convention." As the Lower Congo had been infested for many years with slave traders, this would be a misfortune not only for humanity in general, but for the natives, who would be maltreated with impunity, and for the Europeans and American traders, who would be exposed to the attacks of the blacks.<sup>1</sup> The idea of internationalizing the Congo was suggested by the German explorer, Gerhard Rohlfs, in 1882:<sup>2</sup> "To internationalize the Congo," said he, "would be less easy than the neutralization of the mouths of the Danube. But if Germany and England wish to apply this solution it will cease to appear impossible. France, Italy and Portugal will be forced to follow them, and the Congo will be saved. Liberty for all, under the protection of rules given out by international accord, such should be our watchword." This, according to Sir Travers Twiss, was quite another idea from that of neutralizing the Congo. "Since the Congress of Vienna, the principle of the free navigation of the great arterial rivers of Europe has been steadily gaining ground, and in late years European agreement has settled this principle as one of modern international law, useful and even necessary to assure the march of international civilization and universal peace. Such a system, applied to the navigation of the Lower Congo, would be able to settle the conflict of jurisdiction between Portugal and the maritime European powers."<sup>3</sup>

At the Munich session of the Institute of International Law, M. Moynier again drew the attention of the members to the question of the Congo, considering it a most opportune occasion for the consideration of it, for the *rencontre* between Stanley and De Brazza was familiar to every one. In a memorial presented by Moynier to the Institute, he recommended that that body bring to the notice of the various European Governments the absolute necessity of

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<sup>1</sup> Rev. de Droit International, 1883, 491.

<sup>2</sup> Allgemeine Zeitung, April 22, 1882.

<sup>3</sup> Rev. de Droit Int., Vol. XV., p. 442.



coming to some definite conclusion in reference to the state of affairs on the Congo. With this *mémorial* he presented a *projet* of an international convention consisting of the following articles:

"1. Navigation on the Congo and all its branches shall be entirely free for the subjects of all States, and all feudal rights of tolls shall be forbidden.<sup>1</sup>

"2. Freedom of commercial operations shall extend over all the territory traversed by this river, (3) save that the liquor traffic shall be absolutely forbidden.

"4. Slavery shall be abolished and the slave-trade prohibited in every part of the Congo Basin.

"5. An International Commission shall be instituted for the purpose of taking steps necessary for the security and maintenance of navigation of the Congo." A special article recommended to the powers that conflicts and controversies in regard to the Congo should be submitted to arbitration.

This *projet* was referred by the Institute to a commission for special examination, and as there was not time at the Munich session for a thorough study of its details, it adopted the following resolution, offered by M. Arntz, on the 5th of September:<sup>2</sup> "The Institute of International Law expresses the wish (*vœu*) that the principle of freedom of navigation for all nations be applied to the Congo River and to its affluents, and that all the powers come to an understanding in regard to the proper measures by which the conflicts between civilized nations should be avoided in Equatorial Africa. The Institute charges its bureau to transmit this wish to the different powers, and with it, but only for information, the memorial presented by one of its members, M. Moynier, in the session of the 4th of September, 1883."

It will be seen that in the resolution addressed to the European powers no question is brought up which could be

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<sup>1</sup> F. de Martens in *Rev. de Droit Int.*, 1886, p. 246.

<sup>2</sup> See the article "Le Gouvernement Portugais et l'Institut de Droit International," by M. E. Arntz, *Rev. de Droit Int.*, 1883, p. 537.

construed as an attempt to prejudice any territorial claims on the part of any European Government. The attitude of Portugal, however, toward the Institute shows how jealously Portugal regarded any expression of opinion about the Congo, and how she never lost a chance to assert her sovereignty upon that river when it could be done by diplomacy and not by effectual possession. On the 20th of October, in the same year, a circular letter was sent out by the Portuguese Department of Foreign Affairs to each one of its representatives in Europe, protesting against the interference of the Institute in any question in which Portugal was concerned. "The Institute of International Law, recently in session at Munich, has just declared its vote (*vient d'émettre son vote*) in favor of the neutralization of the Congo, and has decided that this vote be brought to the notice of the great powers. The illustrious society seems to have lost from view the rights which Portugal possesses over the territory traversed by the Lower Congo, and it presupposes, quite contrary to the truth, that Portugal, in desiring to occupy that part of the territory, has the intention of sequestering and of monopolizing, for its own exclusive advantage, the splendid waterway which crosses some of the greatest territories of southern Africa." The Portuguese despatch continued at some length, declaring that the expression of opinion on the part of the Institute was at best but theoretical, and even then, "from all points of view, unnecessary and inopportune."

It is needless to point out that these strictures of the Portuguese Government were quite gratuitous, as the Institute had been very careful not "to record its vote" in favor of neutralization. It must be remembered, however, that at this time Portugal was engaged in the diplomatic negotiations with England which led to the Anglo-Portuguese treaty of 1884, as described above. When the treaty became a failure, Portugal took the first step toward the assembling of a conference which, in the end, went far beyond the expressed "wish" of the Institute. The "Projet

Moynier," annexed to the Arntz resolution, is in many ways carried out by the Berlin Conference, though the Institute had taken the initiative in such matters and so proved that it was not merely a body of theorists. Legal ideas for the protection of submarine cables, proposed in 1879 by the Institute, were adopted by the Conference of Paris in 1883. So, too, on the subject of extradition, and of the inviolability of the Suez Canal, later practice put into operation the ideas of the Institute.<sup>1</sup>

It is not asserted that the Conference at Berlin directly adopted the ideas of the *Projet Moynier*; but if one considers the number of experts in international law who were present in Berlin as counsel for the various representatives, it would be idle to say that the Institute had no influence in the final outcome of affairs on the Congo as far as international law is concerned. It would be wellnigh impossible as well as futile to trace each of the propositions of the General Act to its source. Most of them were not new; none of them can be said to have emanated from the brain of any one publicist.<sup>2</sup> This fact has little to do with the importance of the work of the Berlin Conference, which was to give official utterance to certain propositions in reference to African colonization and to lay down rules by which European activity in the Dark Continent might be carried on peaceably and without conflict. How well the Conference succeeded in this it is difficult to say. The "scramble for Africa" was intensified after the General Act had been given to the world, and the various European Governments have increased, if anything, their colonizing proclivities as far as Africa is concerned. Many of the declarations of the General Act have been superseded; one of them, establishing an International Commission for the Congo, was never put in practice.<sup>3</sup> The declarations which should be made

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<sup>1</sup> F. de Martens in *Rev. de Droit Int.*, 1886, p. 247-8.

<sup>2</sup> Cf. F. de Martens and Engellhardt, in *Rev. de Droit Int.*, 1886.

<sup>3</sup> By a royal decree (April 26, 1886) the Congo Free State assumed much of this work. *Bull. Off. Il.*, 81.

when a power took new territory have not had the effect of preserving "native rights" as was thought. It is hard to see that when a European Government casts envious eyes upon any part of Africa, not taken up by any other European power, the General Act of Berlin is able to effect anything in protecting the sovereign rights of native peoples. The struggle between savagery and civilization can hardly be deterred by any provision of a "declaration." The system of "spheres of influence" and "trading companies" manage to get around any positive stipulation.

The great idea of the Berlin Conference seems to have been the removal of a portion of African territory from the grasp of European powers. Where international conflicts must have arisen, namely, in the center of the continent, a system of neutrality was ordered, and the International Association of the Congo was made use of to keep this "core of the continent," so that each power, colonizing from the coast towards the interior, would be relieved of the struggle which would otherwise be imminent.

The life of the old International African Association has been traced, from its organization in 1876 to its erection into a State recognized by the great powers of Europe. At first an association for purely scientific and philanthropic purposes, it is differentiated into the various committees; one of them, pushed into prominence by the discovery of the Congo River by Stanley, became the International Association of the Congo. It is not long before this last organization assumes political, or at least territorial, pretensions. With its treaties, by which lands are ceded to it by native chiefs, it appears as the International Association, the administrator of the interests of the Congo tribes. It is still a private association, working under the direction of the president, the King of Belgium.

From the 22d of April, 1884, it was in the anomalous position of a private association toward all, save the United States, which recognized it as a power. The arguments used to induce the United States to recognize it have been de-

scribed, that a private association has a right to make treaties, *e. g.* receive territory and exercise sovereignty. The recognition of a State does not depend upon the conditions in which the State has had its birth, but upon the fact of its existence (Calvo). The fact of the United States having recognized the Association as a friendly power might be taken as sufficient evidence of the existence of the Association as a State. The United States had recognized it without "prejudgment of existing territorial rights"; hence there was no full recognition. Not until all territorial claims had been settled was it recognized as a State by all the European powers. When the International Conference disbanded, the International Association was in truth the Congo State, but hardly the Independent State of the Congo if the reversionary interest in favor of France be taken into account.

During the period from the 22d of April, 1884, to the close of the Berlin Conference, the International Association seemed to be paving the way for the organization of the Independent State of the Congo. It may be called a provisional organization awaiting the concurrence of the powers before the technical name of a State is applied to it.

It was a *State*, for the Association in its treaties had changed from being the administrator of natives to the full ownership of territory, the delimitation of which was described in the treaties with France and Portugal. When the Berlin Conference disbanded, the Association stands forth, recognized as a power by European Governments, and with defined territory. The name "State" was all that was lacking. In this regard Leopold of Belgium might well say that he was the State, for the International Association was organized at his initiative, and his was its sole guiding influence. As was said in the Belgium Chambers, "*L'Association Internationale se résumait dans le Roi.*"<sup>1</sup> It was not long before the final step in the construction of the

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<sup>1</sup> Speech of M. Bara, April 28, 1885.

State was taken. On May 29, 1885, King Leopold proclaimed the existence of the Independent State of the Congo. With the end of the Berlin Conference, however, the formative period of the Congo Free State is terminated. Soon afterwards the organization of the State is commenced, a sovereign is chosen, and the active workings of the Congo Free State begin.<sup>1</sup>

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<sup>1</sup> On the 23d of April, 1885, the Belgian Chambers approved the General Act of the Berlin Conference. *Moniteur Belge*, April 28, 1885; *Les Codes du Congo*, 31.

## IV.

THE CONGO FREE STATE AN APPANAGE OF KING  
LEOPOLD II.

It has been shown that on February 23, 1885, the International Association of the Congo had been recognized as a "Power" by most of the governments represented at the Berlin Conference. Its territory was determined and it existed as a signatory of the General Act of the Conference. Its absolute independence was limited by the reversionary interest of France, and also, in a certain measure, by the provisions of the General Act to which it had agreed.<sup>1</sup>

In its ultimate analysis, however, this last can hardly be considered as a limitation of independence, for other powers having territories within the "Conventional Area of Free Trade" were equally bound by the act. The condition of the International Association from February 23 until May 29 was even more anomalous than it had been before. As far as recognition went, it was a State. The head of the Association was King Leopold; in fact, as has been said, he was himself the International Association. From him as the recognized head of the Association, the representatives conducting the negotiations with other governments derived their power. "The International Association did not have at its head that sovereignty of which it is the depository. Those who treated in its name had of themselves no sovereign power; they acted as the mandatories of the King

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<sup>1</sup> "If perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which it will apply. Every government, let it be ever so powerful, renders occasional obedience to the commands of other governments." Austin, *Jurisprudence*, I., 242, ed. of 1869.

of Belgium, himself acting in a quality of which international law had no cognizance,"<sup>1</sup> that of a king acting in a private capacity, as "the head of a private association which in turn had become a sovereign State."<sup>2</sup> No wonder, then, that this "ambiguous and incorrect position" should have been a constant source of difficulty, in hindering negotiations and in many other ways. The International Association was condemned as being an "anomaly and a monstrosity from an international point of view; and from that of the future, it was an unknown danger." This characterization by an "ex-diplomat"<sup>3</sup> shows that another step was necessary in order to place the work of the Association and of the Berlin Conference squarely before the world.

In the choice of an executive for the Congo State one can readily see that King Leopold would be the only one to be thought of, as it was to him that the work owed its initiative and progress from 1876 to 1885. There was, however, an obstacle in the way of his accession to the head of the Congo State, one to be found in the Belgian Constitution itself. Article 62 of this instrument reads as follows: "The King cannot be, at the same time, chief of another State without the consent of the two Chambers. Neither of the Chambers can deliberate upon this question unless two-thirds or more of the members who compose it are present, and the resolution can only be adopted if it receives at least a two-thirds vote of the members."

Popular approval of King Leopold's scheme was a necessity for its fulfillment. Was the nation to be bound to a great philanthropic scheme for the extension of civilization in Africa, or was there an idea that in some way Belgium might profit by the venture? It can scarcely be doubted

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<sup>1</sup> Banning, *Le Conference de Berlin et l'Association Internationale du Congo*, p. 23.

<sup>2</sup> A. Cuvelier, *De l'Incompétance des Tribunaux nationaux . . . et la situation spéciale de l'État du Congo en Belgique*, *Rev. de Droit Int.*, 1888.

<sup>3</sup> *Le Portugal et la France en Congo*, par un Ancien Diplomat.



that though neutral as she was and is, Belgium had, almost since her independence in 1830, colonial aspirations of a certain sort. As early as 1841 many plans of colonization had been discussed and proposals were made to other powers for permission to erect settlements in their distant territory. None of these were in the least successful. Commercial expeditions were sent to South America, to Bolivia and Peru, and to Africa, to Algiers and Egypt. These were all equally futile. The abiding idea was, however, to open a trade with the natives of these countries and thus widen the market for Belgian wares.<sup>1</sup> The same idea which we have seen advanced by Prince Bismarck was held by the Belgians early in their national history.<sup>2</sup>

Nothing of the nature of colonial undertakings was shown in the establishment of the International African Association in 1876, although Laveleye<sup>3</sup> seems to hint that there was. The motives of King Leopold were evidently of a scientific and philanthropic nature. The literature of the time, however, manifested a desire on the part of many Belgians for colonial enterprises.<sup>4</sup>

Nor, indeed, do we see any change when the Comité d'Études du Haut Congo was organized. King Leopold continued in the plan of seeking to establish stations along the river traversed by Stanley. In addition to this, there appears a scheme for bringing the African chiefs under some sort of control in order that the entry of European civilization into the Congo Valley might more easily be made. The difficulty arose from the fact that such an under-

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<sup>1</sup> Tennent's *Belgium*, I., 274-5.

<sup>2</sup> This sentiment may have directed M. Émile de Borchgrave to undertake his historical studies of Belgian Colonies in the Middle Ages. See *Mémoires Couronnées de l'Académie de Bruxelles*, Vols. 32 and 36.

<sup>3</sup> *Forum*, January, 1891.

<sup>4</sup> See E. Reuter, "*Projet de Création d'une Colonie Agricole Belge*," Bruxelles, 1877, and, by the same author, "*Colonies Nationales dans l'Afrique Centrale sous la Protection de Postes Militaires*," Bruxelles, 1878.

taking as conceived by the King was impossible in the condition of the world's progress. Stanley's letter of instructions, sent by Col. Strauch at the outset of the Congo expedition, shows the purpose of the King.

After speaking of the stations which should be established wherever practicable, Col. Strauch proceeds: "It would be wise to extend the influence of the stations to the chiefs and tribes dwelling near them, of whom a republican confederation of free negroes might be formed, such confederation to be independent, except that the King, to whom its conception was due, reserves the right to appoint the president, who should reside in Europe. This confederation might grant concessions (with power to make good what they granted) to societies for the construction of works of public utility, or perhaps it might be able to raise loans like Liberia<sup>1</sup> or Sarawak, and construct its own public works" (Extract from Stanley's Congo, I., 50).

To a practical man like Stanley, such a plan as this was, to say the least, very visionary. In his opinion the influence of the stations could be but small, and in the condition of affairs among the African tribes on the Congo a confederation would be impossible. To Strauch's statement that the purpose of the King was to "create not a Belgian colony, but a powerful Negro State," Stanley replied that he understood that there was no intention to establish a Belgian colony, but that the alternative would be far more difficult. "It would be madness for me to attempt it, except in so far as one course might follow another in the natural sequence of things."<sup>2</sup>

If the desire of having an enormous territory at his command should have gradually taken the place of the former purely disinterested motive of Leopold, one could not wonder at it, particularly when his position as King is taken into consideration. Leopold must have been acquainted with

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<sup>1</sup> Liberia's public debt (1892) was about \$500,000, with the interest upon it (\$35,000) in default.

<sup>2</sup> Letter of July 19, 1879. Stanley's Congo, Vol. I.

Stanley's ideas about the plan of a republican confederation, and yet he allowed him to go on with the work. While no documents appear changing Stanley's instructions, one can hardly believe that a plan was insisted upon, the execution of which was considered by the chief of the expedition as "utter madness." Stanley's statement in his diary that he was about to establish National States in the Congo Basin is explained by his letter to Strauch. It is fair to suppose that he continued in the idea that the "National States," if established, were to be merged into a Belgian colony. This is borne out when the treaties made by the chiefs are examined. There is an evident *animus possidendi* on the part of the Association. Absolute cession of territory was made to the Association wherever practicable. After December 16, 1884, the date of the treaty with Great Britain, the idea of a confederation of Free States, under the administration of the Association, is given up. So far at least Stanley's prediction had been borne out by later developments.

It will be interesting at this juncture to examine a definition of the State, as it appeared at the end of the Berlin Conference, by a Belgian jurist, M. G. Rolin-Jacquemyns.<sup>1</sup> "It is an International Colony, *sui generis*, the generous promoter of which (King Leopold) has been invested, by the recognition and confidence of all the civilized States, with the power and mission of governing, in the interest of civilization and of general commerce, African territories comprised within certain limits which have been conventionally determined." Does the term "International Colony, *sui generis*," explain the status of the institution recognized as a power by the representatives in Berlin? It is difficult to conceive of a colony without a metropolis; the word "International" shows that none such existed. It is true that, like a colony, it received from without all the elements of its political existence.

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<sup>1</sup> In Rev. de Droit International, 1888, p. 168.

It was this condition, described as "*sui generis*," which made the plan of King Leopold as originally conceived an impossibility. An International State better describes the institution, yet that term is open to as many objections as was that of an "International Colony"; legally it was a State, apparently it was international, while in reality its moving spirit was the King of Belgium. To add to the complex condition of affairs, the Belgian Constitution forbade the King the acceptance of the headship of any other State.<sup>1</sup> One is almost forced to confess, with the "Ex Diplomat," that the institution was indeed, "from an international point of view, a monstrosity."

The support of the Belgium people now came to the aid of Leopold and his pet scheme. Many memorials were sent to the King by the various Belgian Chambers of Commerce, urging him to become the sovereign of the new State. Public opinion seemed to be so much in favor of continuing Belgian activity in the work, that on April 16, 1885, Leopold wrote to his ministers asking them to present a resolution to the Chambers, authorizing him to accept the headship of the new State. After speaking of the work of the Association and of the Berlin Conference, he said: "In the face of these encouragements I cannot draw back from the pursuit and achievement of a task in which I have taken an important part, and, as you see, that it may become useful to our country, I beg you to ask the Chambers for their necessary assent. The terms of Article 62 of the Constitution characterize the situation that is to be established. King of the Belgians, I will be, at the same

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<sup>1</sup> To say nothing of the reversion to France. Prof. John Dewey, in *Pol. Sci. Quart.*, Vol. IX., p. 49, says: "Sovereignty is only a metaphysical substratum, save as it is embodied in positive institutions. A government apart from all special institutions is a pure abstraction. . . Sovereignty exists as a definite actuality only as it is realized in institutions which act as its effective organs." Until the Belgian Chambers gave Leopold power to become the head of the newly organized state, one looks in vain for an institution "acting as the effective organ" of the sovereignty of the new state.

time, sovereign of another State. This State, like Belgium, will be independent, and, like her, it will enjoy the benefits of neutrality. It must be self-supporting, and the experience of neighboring colonies authorizes me to affirm that it will have the resources necessary for this. Its defense and police will rest upon African forces, commanded by European volunteers. There will be, then, only a personal bond between Belgium and the new State. I am convinced that this union will be advantageous to our country, without being in any way a burden to it. If my hopes are realized I shall be sufficiently recompensed for my efforts. The good of Belgium is, as you know, the aim of my life."

The sequel to this letter is seen in the resolutions of the Chamber of Representatives on the 28th of April, 1885, and of the Senate on the 30th: "His Majesty, Leopold II., King of the Belgians, is authorized to be the Chief of the State formed in Africa by the International Association of the Congo. The union between Belgium and the new State shall be exclusively personal."

On the 1st of July, 1885, Sir Francis de Winton, who had been given the title of Administrator-General, issued a circular letter to all the commercial houses and mission stations situated on the Lower Congo, in which he made known the existence of the Congo Free State.<sup>2</sup> The letter stated the aims of the government of the Free State to be "the preservation of law and order, the promotion of commerce and industry, the protection and welfare of the native populations." On the 19th of the same month the Administrator-Général made an official proclamation in the presence of a number of native chiefs and of representatives of the various commercial factories on the right bank of the Lower Congo.

The notification to foreign powers of the existence of the Free State was made on the 1st of August, as follows: "The

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<sup>1</sup> *Moniteur Belge*, May 2, 1885; *Bull. Off.*, 1885, p. 21; *Les Codes du Congo*, 31.

<sup>2</sup> *Congo Belge*, 189-90.

possessions of the International Association of the Congo are to form, henceforth, the Independent State of the Congo. His Majesty, Leopold II., has taken, with the consent of the Association, the title of Sovereign of the Independent State of the Congo, the union between Belgium and that State being absolutely personal."<sup>1</sup> On the same date the Free State declared itself perpetually neutral in accordance with Article 10 of the General Act of the Berlin Conference.<sup>2</sup> The advantages guaranteed by the 3d chapter of this Act were thus gained in all the territory the delimitation of which had been determined by the treaties with Germany, France and Portugal.

With the accession of Leopold to the recognized headship of the Congo Free State, as "Sovereign," the form of the State becomes that of an absolute monarchy. Although it has often been said that on July 19, Sir Francis de Winton "proclaimed the Constitution of the new State,"<sup>3</sup> no such instrument existed then or does it exist now. The sovereign has, theoretically, unlimited powers, and the organization of the administration of the new State took place by a *decree* of the *King-Sovereign*, dated at Laecken, October 30, 1885.<sup>4</sup>

By this instrument, the central government is composed of three departments: (1) That of Foreign Affairs and Justice; (2) the Department of Finance, and (3) that of the Interior, each of which to be in charge of an Administrator-General, appointed by the King-Sovereign. The Administrators-General, acting together as a sort of council, consider all questions in which the State is interested, and submit them to the King-Sovereign for his approval. Individually each of the three officers is charged with the execution of the measures decreed by the sovereign. The duties of the various departments are as follows:

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<sup>1</sup> Bull. Off., No. 1, 1885.

<sup>2</sup> On August 22, acknowledgment of the letter of Leopold was made by Great Britain, and on succeeding dates by the other powers. Bull. Off., No. 1, 1885; Les Codes du Congo, p. 14.

<sup>3</sup> So stated in "Le Congo Belge," p. 189, and by Moynier, *op. cit.*

<sup>4</sup> Bull. Off., Vol. 1, No. 2, p. 25; Les Codes du Congo, p. 121.

Foreign Affairs and Justice comprises foreign affairs in general, foreign relations, the negotiations of treaties and other international acts, the maintenance of the diplomatic and consular service, and the conduct of extradition cases, together with all questions of the status and property rights of foreigners resident in the State. It has supervision of commerce and the postal service, including foreign and domestic commerce, navigation, ports and harbors, commercial companies and immigration.<sup>1</sup>

The division of Justice in the above department has charge of the judicial organization, of prisons, charities and worship, with the promulgation of the official bulletins. More important, however, is its complete charge of civil, commercial and penal legislation.

The department of Finance was given the supervision of the following: (a) The levy and collection of imposts of every kind; (b) regulations respecting real property, lands occupied by natives and whites, and its negotiation, public surveys and the State domain; (c) the general accounts of the treasury, including those of the receipts and expenses of the State, accounts of the various accounting officers and agents, the general budget of the State, the public debt and the treasury service; (d) the monetary system and all questions related to it.

The department of the Interior has control of (a) the administration of the provinces and communes, of public instruction, scientific collections, public health, roads and police; (b) it has supervision of the means of communication, land and water carriage and transportation, construction and maintenance of public buildings; (c) the national forces, artillery material, arms and ammunition, the purchase of goods for exchange, superintendence of industry and agriculture are also included in its care.<sup>2</sup>

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<sup>1</sup> Sept. 17, 1885, the Congo Free State joined the Universal Postal Union, declaring its adhesion, to take effect Jan. 1, 1886, to the Convention of Paris, 1878. See Bull. Off., I., 2.

<sup>2</sup> Bull. Off., Vol. I., No. 2, 1885.

The seat of this central government is at Brussels, and one sees in that fact another curious phenomenon. If the Congo Free State is to be considered as absolutely independent, there is one government with its seat within the territory of another power. Immediately the question presents itself as to what position in point of law these ministers of the central authority would have. Were they to be considered merely as representatives of another government, the courts would be incompetent to adjudicate upon any cases in which they, in their official capacity, were parties; otherwise there would be a manifest derogation of the sovereignty represented by the minister.<sup>1</sup> The Congo Free State, as it was established, took the character of an absolute monarchy and of an autocratic government. The King-Sovereign personifies the State and the government. In its last analysis, all legislation emanates from him, and from him come all the powers of government. "If one admits with international law the extritoriality of those sovereigns who are in a foreign country, and, consequently, that of the sovereign of the Congo, who is in Belgium, this extritoriality extends to his government, which emanates from him alone."<sup>2</sup>

If complete independence and sovereignty were accorded the Congo Free State, the relations between its ministers and those of Belgium would be only those of international law. But each one of the head officials chosen by the King for service in the Free State was a Belgian subject and subject to Belgian law. As late as 1888 the curious condition of affairs in this respect existed without specific legislation. "A special mode of procedure" was proposed to fit the case (De Cuvelier).

By a decree of Leopold, April 16, 1889, a Superior

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<sup>1</sup> Pradier-Fodéré, *Traité de Droit International Publique*, I., 294, 324.

<sup>2</sup> De l'incompétence des tribunaux à l'égard des gouvernements étrangers, et la situation spéciale de l'État du Congo en Belgique. A. de Cuvelier, in *Rev. de Droit Int.*, 1888.



Council was instituted. Later decrees organized this body into a Court of Cassation, a Court of Appeals and a Council of State. It is composed of a president and five councillors, named by the sovereign. At its institution this body was composed of three Belgians, MM. Pinnez, Graux and Jacquemyns, and three foreign members, De Martens, Rivier and Barclay. Three of the members constitute the Court of Appeals and the Council of State. All sitting together form the Court of Cassation.<sup>1</sup>

The local government in the Congo Valley was organized by a decree of March 26, 1886, in which were outlined the powers of the Administrator-General on the Congo. This office had been in existence even before the official promulgation of the decree of Leopold announcing his accession to the throne of the new State, and had been filled by Sir Francis de Winton. In July, 1886, two new bodies were instituted, one, the Local Executive Committee, to take the place of the Administrator-General in case of his absence, and the other, the Local Consultative Committee, was charged with the examination of all measures of general interest. The office of Administrator-General gave place, in April, 1887, to that of Governor-General. The latter was given larger powers, and in authority resembles the governor of an ordinary English crown colony. He "represents in the territory of the State the sovereign authority. He is charged with the administration of the territory and of assuring there the execution of measures decided by the central government. He has the supreme direction of all the administrative and military service of the State."<sup>2</sup> He was given the right of issuing ordinances having the force of law, and, in case of necessity, an ordinance of the Governor might suspend the execution of a decree of the Sovereign. The Governor was made president of the Consultative Committee, five of the members of which he has the right to appoint.

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<sup>1</sup> Bull. Off., 1889, 161; 1890, 154; 1891, 111. *Les Codes du Congo*, 143.

<sup>2</sup> Decree of April 16, 1886, Art. I.

The State is divided into twelve districts or provinces, with a sub-governor or commissary for each district, each acting under the direction of the Governor-General.

Closely connected with the organization of the local government is that of the local courts. By a series of decrees and ordinances a system of tribunals was erected, as follows:

1. A Court of First Instance sits in circuit in four places on the Lower Congo, and has cognizance of all suits, either civil or commercial, in which one of the parties is either a person not a native, or the State or the administration. Its jurisdiction over whites extends throughout the State, but for the native population it is confined to the Lower Congo.

2. Where both parties to an action are natives they are judged by the local chiefs and conform to the local customs; but in criminal cases, where one of the parties is not a native and the rest are, the State claims jurisdiction. For this reason three Territorial Courts were established on the Middle and Upper Congo.

3. A Court of Appeals was established at Boma, which takes appeals from the Court of First Instance and from the territorial courts.

The administration of justice in the Country of the Lower Congo is in the hands of well-trained jurists, and, with a system of prisons with hard labor and corporal punishment, law and order are on the whole well preserved. It is otherwise with the upper districts. There many abuses have been common, owing to the incapacity of the State officials. In most of this region martial law is supreme, or else *Conseils de guerre* dispense criminal justice. Many indictments have been brought against the officials of the State. Among them are lack of courtesy and aid to Christian missionaries, harshness towards the natives, and indifference to the prosecution of the slave-trade.<sup>1</sup> Much work has been done in this last direction, however, by the Belgian Anti-Slavery Society.

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<sup>1</sup> Keltie, ch. XIV.

In 1887 police magistrates were appointed, having charge of lesser infractions, mainly on the Lower Congo. A system of *Résidents* was devised in 1892, by which justice might be secured at the hands of the native chiefs. These functionaries represent the authority of the State in the presence of the chiefs, and are appointed by the King.<sup>1</sup> To correct many administrative abuses the more important officials are frequently transferred from Africa to the general offices in Europe and *vice versa*.

From the foundation of the State until 1890 the income of the State was derived almost completely from an annual subsidy made by King Leopold from his private purse. The Berlin Act of 1885, which forbade import duties, cut off an important source of revenue, and as the export dues and revenue from the sale of public lands were insignificant, the budget of the Congo Free State was quite dependent upon the King's generosity. Before the end of the Berlin Conference he had expended 25,000,000 francs upon the Congo experiment, and he contributed from 1885 until 1888 an annual amount of 1,750,000 francs. In the latter year his purse was opened to the extent of 3,000,000 francs, a sum increased to four millions in the next year.<sup>2</sup> From these figures one sees a continually increasing expense of the Congo Free State to the King. There is a limit to a King's private purse, and the amount given by Leopold in 1889 was larger than could be well afforded, for Leopold's private fortune was sacrificed for the Free State, and he privately negotiated a loan of 16,000,000 francs to carry on the work.

Numerous attempts have been made on the part of the Congo officials and others to have the Belgian Government assist in the Congo experiment. In January, 1886, it was sought to raise a lottery loan of 100,000,000 francs, in lots of 20 francs, by annual drawings for twenty years.<sup>3</sup> The

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<sup>1</sup> Bull. Off., 1892, 2; Les Codes du Congo, 285.

<sup>2</sup> Statesman's Year Books, 1886-94.

<sup>3</sup> Statesman's Year Book, 1886, p. 708.

French Government agreed to allow a lottery in France by which twenty millions should be raised in the interest of the Free State. In 1887 the French Government withdrew its promise and reasserted its right of reversion to the whole of the Congo territory; moreover, a claim was laid to certain territories in Africa hitherto in the possession of the Free State. After a long diplomatic correspondence between the Congo State and France, a protocol was signed, May 10, 1887, which admitted nearly all the claims of France. The very considerable territories claimed by France were ceded to her. The Congo State declared on the subject of the reversion that, "according to the view which it had always had, the 'clause of pre-emption' could not be opposed to Belgium in case she should, at some time, be substituted for the Independent State." It is doubtful, however, if this view be correct, though it has been assumed that France would not claim her interest unless Belgium should attempt to realize from her possessions acquired from the Congo Free State.<sup>1</sup>

In order to develop the resources of the Free State and, particularly, to aid the construction of the Congo Railway, some sort of a loan was a positive necessity. In February, 1887, M. Van Eetwalde, the Administrator-General for Foreign Affairs, wrote a letter to M. Beernaert, the Belgian Minister of Finance, in which he requested the authorization by the Belgian Government of a loan of 150,000,000 francs.<sup>2</sup> The Belgian Chambers, April 29, 1887, gave the necessary permit, and the loan was established by a decree of February 7, 1888. By this plan a hundred thousand obligations of 100 francs each, issued at 83 francs, and redeemable in 99 years, with interest at 5 per cent., were placed at public subscription in Belgium, Holland and in Switzerland. The first issue of the loan, in March, 1888, was largely subscribed to; nevertheless the financial foundation of the State was hardly secure, for after greater expen-

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<sup>1</sup> Congo Belge, p. 194.

<sup>2</sup> Letter in Congo Belge, 331 *et seq.* Scheme of lottery loan, 356.

diture by the King, the Belgian Government came to its aid and rendered it active assistance.

By a law of July 29, 1889, the Belgian Government was authorized to participate in the subscription of the Congo to the extent of ten million francs. This was in aid of the *Société Anonyme Belge*, organized in the interest of the Congo Railway. The subscription was represented by twenty thousand shares of 500 francs each, with interest at  $3\frac{1}{2}$  per cent., redeemable at par in ninety-nine years.

In the next year Belgium came more actively to the assistance of the Congo State. On the 3d of July, 1890, a treaty was concluded between the two, in accordance with which the Belgian Chambers passed a law on the 4th of August, 1890, granting a credit of five million francs. This treaty is as follows:

"The Belgian State promises to advance, as a loan to the Independent State of the Congo, a sum of 25,000,000 francs as follows: five millions when the treaty is approved by the Chambers, and two millions annually for ten years, beginning with the first instalment. During these ten years the sums thus loaned shall not bear interest.

"Six months after the expiration of the said term of ten years, Belgium may, if she think fit, annex the Independent State of the Congo, with all the goods, rights and privileges attached to the sovereignty of that State, such as have been recognized and fixed, notably by the General Act of Berlin of February 26, 1885, and by the General Act of Brussels and the Declaration of July 2, 1890; but on condition that the obligations of the said State to third parties be paid, the King-Sovereign expressly refusing to be indemnified for his personal sacrifices. A law shall govern the special régime under which the territories of the Congo shall then be placed.

"From now on, Belgium shall receive from the Independent State of the Congo such information as may be deemed necessary concerning its economic, commercial and financial condition. Belgium shall receive, in particular, statements of

the budget and of customs-dues. These communications shall have no other aim than the information of the Belgian Government, which shall in no way intrude in the administration of the Congo Free State. The latter shall continue to be attached to Belgium only by the personal union of the two crowns. The Congo Free State promises to contract no new loans without the consent of the Belgian Government.

"If at the end of the said term Belgium decide not to accept the annexation of the State of the Congo, the sum of 25,000,000 francs loaned, entered on the ledger of its debt, shall be due only after the expiry of a new term of ten years; but during this time the loan shall bear interest at  $3\frac{1}{2}$  per cent. per annum, payable half-yearly. Even before this term the Independent State of the Congo must turn over, as partial payments, all the sums arising from land grants and from State mines."

As has been said, the possible resources of the State were sadly interfered with by the prohibition of import duties. Certain export duties were established by a decree of December 15, 1885, but the revenue therefrom was practically inconsiderable. These were as follows, the 100 kilos taken as a unit: Ivory, 50f.; rubber, 20f.; copal, 2—8f.; palm oil, 2f. 50c.; coffee, 1f. In 1886-7 the exports and imports were each valued at about 7,000,000 francs. Various items of export in succeeding years are as follows:

YEAR.	IVORY.	COFFEE.	RUBBER.	NUTS.	PALM OIL.	COPAL.
1886-7	1,600,000f.	1,497,000	2,000,000	701,870	648,560	. . .
1887-8	1,841,120	1,809,678	1,748,187	972,280	801,393	163,542
1888-9	2,034,920	863,436	2,078,132	1,194,608	799,808	142,374
1889-90	5,070,851	1,685,604	3,080,358	2,464,619	1,563,766	96,484
1890-1	3,318,000	1,643,000	2,320,000	1,864,000	1,227,000	. . .
1891-2	3,905,820	309,786	1,841,596	840,064	569,628	. . .

These figures, compiled from the Statesman's Year Book, certainly do not show the steady increase in commerce that

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<sup>1</sup> *Moniteur Belge*, Aug. 7, 1890; *Pandectes Périodiques*, 1890, No. 1665; *Les Codes du Congo*, 32.

one might hope for. One or two points are to be noticed in connection with them. The climax is reached in 1889-90, during which year import duties were laid for the first time. The increase in the ivory export is to be explained by the continually increasing activity in the ivory trade by the Congo State itself.<sup>1</sup> It may be said that a very large proportion of the ivory exported in 1890-1 was handled by the State to the exclusion of the companies. Indeed, it has been the policy of the State, particularly since 1890, to engage in traffic, with the result that many of the private traders, especially those of other nations, have either left the country or have gone to the French or Portuguese territories in the Congo Valley.<sup>2</sup>

For the purposes of comparison, the following table is made of the annual revenue of the State and the sources from which it was derived:

1885-6,	Subsidy of 1,750,000 francs, given by Leopold, (estimate).		
1886-7,	" 1,750,000 "	" "	" "
1887-8,	" 1,750,000 "	" "	" "
1888-9,	" 3,000,000 "	" "	" "
1889-90,	" 4,000,000 "	" "	" "
1890-1,	Income (estimated) 4,554,930 francs, derived from subsidy from Leopold of	2,000,000 francs.	
	Advance from Belgian Government,	2,000,000 "	
	Taxes and Land Sales	554,930 "	
1891-2,	Income from subsidy,	2,000,000 francs.	
	" " Belgian advance,	2,000,000 "	
	" " Taxes and Land Sales,	721,981 "	
	Total Income,	4,721,981 "	
1892-3,	Revenue	5,440,681 francs derived	
	from Belgian advance,	2,000,000 "	
	" Subsidy,	2,000,000 "	
	" Taxes and Imposts, etc., <sup>3</sup>	1,440,681 "	

<sup>1</sup> A decree of July 25, 1892, forbade the hunting of elephants except by special permission. Another decree forbade private trade in caoutchouc with the natives. This has been recently modified so that the trade is allowed in certain districts.

<sup>2</sup> Keltie, 215 *sqq.*

<sup>3</sup> Figures compiled from Statesman's Year Book.

It will be noticed that in the year 1890-1 occurs the first mention of an income from taxes and land sales. The latter source may be said to be quite insignificant, so that the half million francs in the budget of 1890-1 is from taxes and those derived from import duties.

The General Act of the Brussels Anti-Slavery Conference in 1890 has a supplementary declaration by which the prohibition of import dues, as laid down by the General Act of Berlin, 1885, is removed. The Berlin Act had declared for perfect free trade for twenty years. A glance at the annual budget of the Congo Free State shows the financial effect of the prohibition. Until a means could be formed for gaining a revenue for the State it must have been quite dependent upon the purse of King Leopold. The amount given by him in 1889, three millions of francs, is a sufficient excuse for the activity he displayed in the attempt to have the prohibition of import duties removed. In the article appended to the Brussels General Act, the "signatories or acceding powers who have possessions or protectorates in the said conventional basin of the Congo shall be able, so far as authority is required to this end, to establish duties on imported goods, the scale of which shall not exceed a rate of 10 per cent. ad valorem." It was decided that, as in 1885, no differential treatment or transit dues should be allowed, and the arrangement was to be in force for fifteen years. By a decree of April 9, 1892, a financial schedule of import duties was published, and with it was introduced a complicated system of government warehouses for imported goods of all kinds.<sup>1</sup>

The relations between Leopold and the Free State, on the one hand, and Belgium, on the other, remain to be traced. It has been stated that by a vote of the Chambers on April 30, 1885, Leopold was authorized to be Chief of the Congo Free State. "The union between Belgium and the new State will be exclusively personal." On the 2d of August,

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<sup>1</sup> See U. S. Special Consular Reports 1892, Tariffs of Foreign Countries, pp. 493-515.



1889, King Leopold made a will, in which he designated Belgium as the sole heir to all his sovereign rights in the Congo State. The loan made by the Belgian Government in July, 1890, has been referred to. A codicil to the King's will, dated July 31, 1890, declared that the territories of the Congo Free States are inalienable, yet as the right of France to a reversionary interest still holds, it is difficult to see what force such a declaration would have.<sup>1</sup> The last question which presents itself is that of the desire of the Belgians for colonial possessions and the manifestation of the colonial spirit in the revision of the Belgian Constitution in 1893.

It has been shown that from a mercantile point of view, colonies had long been desired as outlets for the products of Belgian industry. If there be added the desire of King Leopold for exclusive control over a territory to the development of which he had been the only contributor, the popular enthusiasm for colonial possessions is easily explained. Much discussion took place from 1890 on, as to whether, according to the Constitution, Belgium could legally hold colonies. It was maintained<sup>2</sup> that for two reasons Belgium could hold colonies: because there was no article in the Constitution which expressly forbade it. The second was based on Article Sixty-Eight of the Constitution. This states that "no cession, exchange or addition of territory can take place save by a special law." It was maintained that by a law, such as that of April 30, 1885, whereby Leopold was authorized to become sovereign of the Congo Free State, colonial territory might be acquired. Many practical as well as legal objections were seen in this scheme, and it was never acted upon. On the other hand, it was declared by the Belgian ministry, in considering the question of constitutional revision, that "colonies did not compose a part of the national territory." Without discussing the truth of this proposition, one turns to the revised Constitution for

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<sup>1</sup> Keltie, 212.

<sup>2</sup> *De la Revision de la Constitution Belge*. Prof. J. Van den Heuvel, Bruxelles, 1892, pp. 182 *sqq.*

the settlement of the question. Article 1 of the text of 1831 is as follows: "Belgium is divided into provinces. These provinces are Anvers, Brabant, Western Flanders, Eastern Flanders, Hainault, Liege, Luxembourg (with the exception of the relations of Luxembourg with the German Confederation). If it be necessary, the territory may be divided by legislation into a greater number of provinces." The revised text omits the words in parentheses, and adds:

"The colonies, foreign possessions or protectorates such as may be acquired by Belgium are to be ruled by special laws. Belgian troops for the defense of these can only be recruited by voluntary enlistment." Thus the matter is settled once for all. If the Chambers decide in 1900 that the Congo Free State shall be a Belgian colony, there is no constitutional hindrance to such a step. France, with her reversionary interest, may intervene, but that depends largely on the economic development of the country within the next six years. France has at present more territory in Africa than any other power, but most of it is desert and wilderness. It is questionable if the fad of African colonial extension continue until the day when France may press her claims.

Notwithstanding the fact that the Free State was declared perpetually neutral, it has not been deterred from attempting to enlarge its original boundaries. Between 1890 and 1893 various expeditions were sent to the Upper Wellé and Kattanga for the purpose of extending the dominion of the Free State.

An entry of the Free State forces into the Nile country was at first allowed by the British East African Company. This permission was afterwards vetoed by Lord Salisbury, and Lord Rosebery took the same position. It was thought that the occupation by the Congo State of lands in the territory granted England by the Anglo-German and Anglo-Italian agreements would bring in the question of sovereign rights, as *effective* occupation was necessary to the British title.

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<sup>1</sup> Text in Bull. Mens. de la Soc. de Leg. Comp., 1893, p. 611.

After a protectorate had been proclaimed over Uganda, Lord Rosebery entered into an agreement with King Leopold, as Sovereign of the Free State (May 12, 1894), by which a connection might be made between British East and Central Africa. In return for this, Great Britain leased to King Leopold and the Congo Free State the territory comprised between 25° east longitude and the Nile and 10° north latitude and Lake Albert Nyanza. The strip between 30° east longitude and the Nile was to revert to England on Leopold's death. The rest was to continue in lease "so long as the Congo territories, as an independent State, or as a Belgian colony, remain under the sovereignty of his Majesty or his successors." It would have been difficult for Great Britain to assure an effective occupation of this territory and maintain it against the Nile-ward advances of France. By the lease the Congo Free State was to attempt an effective occupation (though this doubtless would be an impossibility), while Great Britain held the title and reserved her sovereign rights.

France immediately entered a protest against this agreement, on the grounds that her reversionary interest gave her the right of veto where cession of territory was concerned, and that, as the boundaries of the Congo Free State had been determined by an international conference, they could be changed only by similar action.

The lease of the strip east of 30° east longitude was rescinded on account of France's action. The Congo Free State thereupon made an agreement with France not to occupy the territory between 25° and 30° east longitude, in return for which France gave up her claim to certain disputed lands in the Congo basin. Finally, the Anglo-Congo agreement fell to pieces when Germany refused to agree to the lease by Great Britain of the strip between Lakes Banguecolo and Tanganyika. With France, Germany held the view that such an act was contrary to the provisions of the General Act of 1885 and the declarations of neutrality made by the Free State, and also to those of the treaties made with the Free State in 1884 and with Great Britain in 1890.

The history of European interest in the Country of the Congo has been traced from the time of its discovery to the present time. The attempt has been made to show that until the International Association finished its work the territory of the Congo was virtually a "no-man's land." The claims of Portugal, resting upon discovery and Papal grant, were not asserted until some one else showed a desire for the acquisition of the territory. Seeing the international difficulties that might arise if the center of the continent continued to be the goal of the colonial aspirations of the powers, it was agreed that the International Association of the Congo should be recognized in its possessions, and that thus the center of the African continent might be removed from the "scramble." The magnificent project of an International State was proposed. But the world was too young to make such an artificial political structure a stable one. Unknown to law, it was anomalous in its character. With the accession of Leopold to the position of sovereign, the State practically lost its international character. It became an appanage of the King of Belgium. Financial aid rendered by Belgium made it more clearly a Belgian affair. Lastly, the right of annexation in 1900, the imposition of import duties and the constitutional provision of 1893 give the Congo Free State its distinctive character: a Belgian colony in all but name, with a right of reversion held by France.

If Belgium repudiates the Congo, France's empire in Africa may be greatly increased. But as an international conference legalized the birth of the Congo State, so may another conference be necessary to perform the obsequies before the residuary legatee enters into possession.

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INDEX TO TWELFTH VOLUME

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A

Accomac, the Quakers in, 194; the Presbyterians in, 220.

Act of Uniformity, of 1622, 183.

Activity, municipal, and construction of railroad, 7; in the U. S., 7-8.

Adams, *Mr.* C. F., on the voting of non-freemen, quoted, 425 (foot-note).

Adams, *Prof.* H. B., a memorial of L. S. Merriam by, 107-109.

Administration, local, the restriction to the power of, 8; in the U. S., 8.

Administrator-General of the Congo Free State, powers of, 596.

Africa, European colonization in, 527, 528.

Albemarle County, 105; divisions of, 152; delegates from, 157.

Algonquins, the, 468.

"Alien Law," 397.

Allerton, Isaac, 438.

American cities, the, and the railways, 80.

American institutions, origin of, 115; Indians and English institutions, 467-519.

Andros, *Sir* Edmund, 431; tyranny of, 431, 432.

Appendix to the Cincinnati Southern Railway, 89-93.

Assembly, the General, of N. C., history of, 151-161; and the Lords Proprietors, 152-153, 156, 158; and the Fundamental Constitutions, 153; of 1715, 156; rules of, 157; and Sir Richard Everard, 158; two houses of, 158-160; the officers of, 160.

Assistants, nomination of, 401-402; election of, 401-402 (foot-note); life-officer, 403 (foot-note); number of, 404; controversies between deputies and, 409-414, 415 (foot-note); primary assembly, 437-438.

Augusta, the parish of, 208.

B

Bacon's Law, and slavery, 506.

Baltimore, *Lord*, 129.

Baptists, the, in Virginia, 192.

Bassett, John Spencer, on "The Constitutional Beginnings of North Carolina," 105-169.

- Belgium, and colonization, 591, 608; and France, 608, 609; and England on the Congo State, 609.
- Bemis, *Prof.* Edward W., a memorial of L. S. Merriam by, 105-106.
- Berkeley, *Governor*, 188; instruction of the Crown to, 191; Quakers and, 195.
- Berkeley, *Sir* William, 151.
- Berlin Conference, 545-588; Prince Bismarck's invitation to, 545, 546, 550; and the U. S., 551-553; U. S. represented at, 552-554; objects of, 554-556; and England, 556; and Portugal, 557; limits of the basin of the Congo and, 558, 559; and freedom of commerce, 559-561; prohibition of monopolies, 561, 562; freedom of worship, 562; prohibition of slavery, 563; international commission, 563-565; and acquisition of new territory, 565-567; and the International Association of the Congo, 568; and neutrality, 568-569; General Act of, 569-570; effects of, 585-586.
- Bishop, Richard M., ex-mayor, 24.
- "Black-Beard," *see* Thatch.
- Blair, the *Rev.* James, 177.
- Board of Trustees, of the Ohio Railroad, 21; appointment of, 24; works of, 25, 32; plan of construction of, 35-37, 42; foreign negotiation, 33; and the interest of the bonds, 38; and the contractors, 40; new plan of, 42; acts concerning, 42, 44, 46; and the railroad company, 45; discretion of the, restricted, 46-47; members of, 63; and loan, 66; weakness of, 66; and the general public, 73 (foot-note); financial operation of, 75.
- "Boesal Law," 61.
- Bonnet, *Major* S., 321; depredations of, 321-326; cruise of, with Thatch, 323; expedition of Col. W. Rhett against, 327-330; fight with Rhett, 330-333; captured, 333, 334; in custody, 335, 336; escapes, 337; retaken by Rhett, 338; trial of, 338-343; sentenced to death, 341, 343, 344; executed, 345; his final plea, 345-347; courts and capture of, 362.
- Boyle, *Hon.* Robert, 512.
- Brack, *Dr.*, on "Huguenot Emigration," 203.
- Bradford, William, 437.
- Brewer, *Justice*, quoted, 61.
- Burnet, *Governor*, 477.
- Burnside, *Gen.*, 15.
- Burrington, *Governor*, on the people of N. C., 111.
- C
- Cabot, John, 113.
- Carey Rebellion, 109.
- Carolina, the beginning of constitution of, 106; division of, 106; Governor of, 107; pirates and colonial commerce of, 241-370; early settlement of, 245-248; early piracy in, 254-257; act of 1687, 258; Quarry's administration, 259 and foot-note; hostilities against the Spaniards, 260, 261; Colleton's administration, 261-265; Sothell's administration, 265, 266; Ludwell's administration, 266-270; Smith's administration, 271-272; Archdale's administration, 273-275; Black's administration, 275-282; act of 1698, 276, 277; introduction of rice, 280; abrogation of the Fundamental Constitutions of, 284, 285.
- Carver, *Mr.* John, 437.
- Carver, *Mr.* T. N., on Dr. Merriam, 113.
- Cass, *Governor* Lewis, quoted, 472, 474.
- Chancellor, the, of Temporalities, 120.
- Charter, the, of 1691, 452; changes introduced by, 482-484.
- Cherokees, the, 469.
- Chicago, population of, 10 (foot-note).
- Chiloango river, the, 605 (foot-note).
- Church of Virginia, the, and Church of England, 175-176; Governor and, 178; theories on the head of, 178; Germans and, 206; peculiarities of, 233.

- Cincinnati, commercial center of the West, 10; population of, 10 (foot-note); commercial development of, 11; commerce of, and the war, 15; and the Southern States, 16-17; and Louisville, 18; the trustees of the railway, 21; and Chattanooga Railway, 25; financial operation relating to the railway, 74; the municipal results of the railways, 74-88; the railway and development of, 79-81; industrial activity of, 80; influence of railway upon, 83-86.
- Cincinnati Southern Railway, the, J. H. Hollander on, 7-96; first charter of, 11; competitors of, 13; President Lincoln and, 15; difficulties, 30, 38; work in 1869-70, 33; construction of, 35, 39; financial difficulties, 35; plan of construction of, 35; awards of work, 39-40; first loan of, 39; second loan, 43; and the trustees, 45; in 1877, gross earnings of, 49; completion of, 49; lease of, 50, 55; Ferguson Act on lease of, 50; plans of leasing, 51; incorporated, 52-53; interest in, 54; special loan, 54; act relating to, 54; operation of, 55; rates, 59; bonds of the company, 64, 66; loans of, 64, 76; history of, 69; cost of, 71; the character of, 72; the municipal results of, 74-88; finance of, 76-78; and the development of Cincinnati, 79-86; the freight rates of, 82; the future of, 87; bibliography of, 94-96.
- Civil liberty, the development of, in N. C., 108.
- Clark, *Prof. J. B.*, a memorial of L. S. Merriam by, 109-211.
- Colleton, *Sir Peter*, quoted, 145.
- Colonial franchise, 399.
- Colonial laws, penalties, 397 (foot-note).
- Colonial officers, election of, 399.
- Colonization, Belgian plan of, 621.
- Colony, Henry VII. and, 113-117; English idea, 113; proprietary, defined, 113; charter, 114.
- "Combinacon, solemn," the, 436.
- Comité d'Études du Haut Congo, 621.
- Concession, the, of 1665, 131.
- Confederation, the, of 1643, 457-460; benefit of, 458; weakness of, 458-459.
- Congo country, the, missionaries to, 528; slave trade in, 534-536; explorations, 536, 540, 543; treaties between native chiefs of, 541, 542; and Great Britain, 543; and France, 543.
- Congo Free State, the, international beginnings of, 527-617; introduction, 527-536; sovereignty of, 565, 588; as a neutral state, 569 (foot-note); and International Association of, 579, 580; and Leopold II., 589-610; and France, 589; definition of, 593; the independence of, 596; government of, 596; duties of the government of, 597; Superior Council instituted, 599; judicial courts of, 599; local government of, 599; divisions of, 600; local courts of, 600; police magistrates in, 601; financial system of, 601-607; treaty between Belgium and, 603-604; export items of, 604; as European question, 610; bibliography of, 613-617. *See* Contents, 525, and International Association.
- Congo river, the, discovery of, 528; discovery by Stanley, 539.
- Conjunct Presbytery, the, 217.
- Connecticut, reservation system in, 480.
- Constitution, of N. C., sources of, 113-125; and proprietors, 126-139, 140; analysis of, 140-169.
- Controversies, between Deputies and Assistants, 409-414, 415 (foot-note).
- Cooley, the *Hon. Thomas M.*, and the Ohio constitution, 23; letter relating to the Ohio Railway, 92-93.
- Corporation, Mass., and new-comers, 396.
- Cotton, *Mr.*, 410.
- Council, the, in N. C., history of, 146; and Governor, 146; in the second period, 147; the Grand,

147; powers of, 148; rights of, 150.  
 Council, the, function of, 431.  
 County, in England, 122.  
 Court of Election, 400.  
 Court, the N. C. General, 161-164;  
   Precinct, 165-166; of Chancery,  
   166; Admiralty, 166; Council,  
   167.  
 "Culpepper Rebellion," 108.

## D

Dartmouth College, and Indian education, 515.  
 Davies, the *Rev. Mr.*, 219, 222, 230; on license for preaching, 224; on military service, 232.  
 Dawson, *Commissary*, quoted, 228, 231.  
 Deputies, election of, 394 and foot-note; elected by bailot, 399; apportionment of, 405-408; charges of, 406 (foot-note); controversies between Assistants and, 409-414, 415 (foot-note); organization of House of, 415.  
 de Winton, *Sir Francis*, letter, quoted, 595, 599.  
 "Dickson Plan," the, 18.  
 Dillon, *Judge*, quoted, 61.  
 Dinwiddie, *Governor*, and Mr. Smith, 230, 495.  
 Disfranchisement, causes of, 455-456.  
 Dissenters, Protestant, in Va., 175; laws against, 186; struggle of, 187-202; number of, in Va., 198; fining of, in Va., 218; the Bishop of London and, 223, 224; cause of the increase of, 234; contentions of, 235; petition of, 419; and General Court, 419-420.  
 "Doughty over-issue cases," 53.  
 Drummond, *Governor*, 144.  
 Dudley, *President Joseph*, and his associates, 431.  
 Durham, Palatine of, 119; parish government of, 122.

## E

Eliot, John, 480; and Indian education, 514.

Ely, *Prof. Richard T.*, a memorial of L. S. Merriam by, 106.  
 Endicott, John, 379, 415.  
 English, dealings with the Indians, 472-474; and Indian trade, 480; criticism of trading policy, 492; relation to Indian, 518-519.  
 English institutions and the American Indians, by Dr. James, 469-519.  
 Everard, *Sir Richard*, 158.

## F

Felton, Samuel M., 53.  
 Ferguson, *Mr. Edward A.*, 18; and the Ohio constitution, 19-20; as a trustee, 63; achievement of, 73.  
 Ferguson bill, the, 20, 22, 24, 27; the comment of, 22 (foot-note); became a law, 23; reaffirmed, 31.  
 Ferguson Act, referred to, 60; and trust, 62; and municipal loan, 65.  
 "First two million act," the, 46; difficulties in the passage of, 47.  
 Franchise, the Palatinate, 117-123.  
 Franklin, Benjamin, and Indian trade, 489, 495.  
 Frederick, the parish of, 208.  
 Freemen, in Mass., 382, 388, 389-391, 394, 399; and colonial officers, 400, 417; privileges of, 418; and church-members, 421-424; in colonies, 445-446.  
 Freight rates, the, of the Ohio Railway, 82.  
 Fundamental Constitutions, the, of Carolina, 123, 131-139; growth of, 132-133; contents of, 133; division of society, 133; and slaves, 135; and religious belief, 136; and biennial Parliament of, 136; characteristics of, 137; effect of, 138; editions of, 139 (foot-note).

## G

General Assembly of Virginia, religious questions and, 177; church regulations and the, 180.  
 German African Society, founded, 548.

Germans, in Va., 205-207; church of Va. and, 206.

Germany, as a colonizing power, 547-550.

General Court, the first, 382; character of, 383; power of, 391, 416-418; and Assistants, 400; composition of, 409, 416; and the "sow business," 413; and free-men, 425-428; abolished, 431; reorganized, 435.

Gentry, in Mass., 393.

Gooch, *Gov.*, Presbyterians and, 208, 211, 215; quoted, 211, 214, 216.

Government of the Congo Free State, divisions of, 596; duties of each division, 597; seat of, 598; character of, 598.

Governors, of Carolina, 107; in the constitution, 141; power of, 141; Deputy, 141; function of, 142; appointment of, 143, 145; and the English crown, 143, 144; salary of, 144.

Governor-General of the Congo Free State, power of, 599.

Graffenreith, *Baron de*, Germans in Va. and, 206.

Great awakening of 1740, 212.

"Great Southwestern Railroad Convention," the, 11.

Green, *Dr. D. I.*, on *Dr. Merriam*, 112.

Greenwood, Miles, 24.

Gross earnings of the railroad, 58.

Gunn, *Mr. W. A.*, 15 and footnote.

## H

"Half-way Covenant," 424.

Hammond, John, quoted, 184 (foot-note).

Hanover, Presbyterians of, 216; Dissenters in, 234.

Harvard College and Indian education, 513.

Hayne, *Governor*, 11.

Haynes, *Dr. George H.*, on "Representation and Suffrage in Massachusetts," 378-460.

Heidelberg, Philip, 24.

Henrico, the college at, 510.

Herriott, *Dr. Frank I.*, on *Dr. Merriam*, 114.

Hollander, J. H., on "The Cincinnati Southern Railway," 7-96; on "A Memorial of Dr. L. S. Merriam," 97-105.

Hooker, *Mr.*, 409.

Hooper, William, 24.

House of Burgesses, the, 157; dissenting ministers and, 228.

House of Deputies, the, organization of, 415.

Hughson, S. C., on "The Carolina Pirates and Colonial Commerce," 241-370.

Huguenots, in Virginia, 203-205; and the Edict of Nantes, 203; Manakin Town, 204.

## I

Independents, Nansemond, 184; in Va., 185.

Indian education, provisions for, 509-519; the English king on, 509; method of, 512; primary idea in, 513; in New England, 514-517; results of, 515, 516; in Va., 516.

Indian government, 481.

Indian slavery, 502-508; among the Spaniards, 502; among the English colonists, 502; legislation on, 503; in Va., 507; in N. Y. colony, 507-508; in Conn., 508; general remark on, 508.

Indian, the American, and English institutions, 467-519; problem, 467; distribution of, in the colonies, 468-469; tribes of, 468; policy of the French, 472; policies of the English, 473, 474; and English land tenure, 475; reservation system, 479-482; officials, 481; trade, 482-502; currency, 483 and foot-note; influence of liquors on, 491.

Indian superintendence, 517, 518; in Mass., 517; in N. Y., 517; function of, 518, 519.

Indian trade, 482-484; and the colonists, 484; in Plymouth Colony, 484; under the United Colonies, 485-486; in Mass. Bay Colony, 486, 493; in Virginia, 487; in fire-arms, 488; and colonial alliance, 489; in liquors, 491.

"Inhabitants," 397; defined, 398.  
 Institute of International Law, 610-615; criticized, 614.  
 Intendants of Trade, 490.  
 International African Association, the, 537-546; formed, 537; exploring expedition by, 538, 539; Comité d'Études du Haut Congo, 539; exploration of de Brazza, 543-545; flags of, 545; German committee of, 538, 548; summary, 586-588.  
 International Association of the Congo, the, 539-546; established, 539-541; expedition under the auspices of, 540; treaties of, 541, 542; represented in the Berlin Conference, 553, 561, 562; freedom of commerce, 559-561; monopolies prohibited, 561, 562; freedom of worship, 562; slave-trade prohibited, 563; recognized by the Berlin Conference, 568, 577, 578; recognized by the U. S., 545, 571; and France, 572, 574, 575; and Germany, 573; and Great Britain, 574; and other powers, 574, 576; and the General Act of the Berlin Conference, 578, 579; name changed, 580; summary, 586-588; recognized as a state, 589; the work of, 594. *See* Congo Free State.  
 Ipswich, against the Governor, 432; suppression of town-meeting, 433.  
 Iroquois, the, territory of, 468; in American history, 469; and the Algonquin, 471; and other tribes, 471.

J

James, Dr. J. A., on "English Institutions and the American Indian," 467-519.  
 Jefferson, *President*, and trading-house system, 498.  
 Jenks, Prof. J. W., on Dr. Merriam, 113.  
 Johns, the Rev. Hugh, "Present State of Virginia," by, 171; quoted, 177, 182.  
 Johnson, *Colonel*, 508.  
 Johnson, Sir William, 492, 517.

## K

Kay, the Rev. Mr., case of, 229.  
 Keayne, *Capt.*, and the "sow business," 411-413.  
 Kent, *Chancellor*, quoted, 478.  
 Kentucky bill, the, 27.  
 Kentucky Central Railroad, the, 14.  
 Kentucky, General Assembly and railroads, 26; railroad problems in, 25-30; legislature and the railway, 32.  
 Knoxville Southern Railroad, 22.

## L

Land, purchase of, from Indians, 476.  
 Laveleye, 591.  
 Lease, and operation of the Ohio Railway, 50; plans of leasing, 51.  
 Leopold II., and Congo Free State, 589-610; and International Association, 589; and the Belgian people, 594; on the International Association, 594; letter to the Chamber, quoted, 594-595; Lord Rosebery and, 609.  
 Lessees and trustees of the railway, 56.  
 Liberia, public debt of, 592 (foot-note).  
 Lincoln, *President*, and Cincinnati Southern Railway, 15.  
 Lisbon, treaty of, 529-530; convention at, 534.  
 Locke, John, and constitutions, 132-133.  
 London, Bishop of, and Virginia, 177; quoted, 223; clergy of Va. and, 223; dissenting ministers and, 223, 224.  
 Lords Commissioners of Trade, Presbyterians of Va. and, 227.  
 Louisville, population of, 10 (foot-note); and Cincinnati, 18.

## M

Mack bill, the, 56, 58.  
 Mackie, the Rev. Josias, 199.  
 Maine colony, the, 457.  
 Makemie, the Rev. Francis, 198-199.



Manakin Town, Huguenots in, 204.  
 Maryland and North Carolina, 115.  
 Massachusetts, Dr. Haynes on representation and suffrage in, 377-460; Company of, Bay, 378; growth of citizenship in, 379; constitutional development, 382; colonial officers, 383 and foot-note; growth of Assistants' oligarchy, 383; citizenship and church membership, 385, 395, 421-428; religious oligarchy, 385; question of taxation in, 387; Watertown protest, 387; germ of representative government, 388; preliminary meeting of deputies, 389; representative government of, 392-393; and the Restoration, 426; under James II., 430-434; under William and Mary, 434; old charter renewed, 435; provisional government, 435; and Plymouth governments, 450-451; changes by charter of 1691, 452-484.  
 Massachusetts Bay, the colony of, 380; history of, 382. *See* Massachusetts.  
 Maxwell, *Colonel* Sidney B., quoted, 84, 86.  
 Mayflower Compact, the, 436, 437.  
 McIlwaine, Dr. Henry R., on the "Struggle of Protestant Dissenters for Religious Toleration in Va.," 175-235.  
 McKee bill, the, 29.  
 Merriam, Dr. L. S., a memorial of, 97-116.  
 "Montgomery Territory," 82.  
 Moody, depredations of, 349; expedition against, 350-352.  
 Moor's Charity School for Indians, 515.  
 Morris, Mr. Joshua, quoted, 213; on the Presbyterians, 219; case of, 217.  
 Municipal activity, and the construction of railroad, 7; in the U. S., 7-8.  
 Municipal results of the Ohio Railway, 74-88. *See* Contents, 6.  
 Municipal work, the Ohio courts on, 28.

## N

Nansemond Independents, 184-185.  
 Naumkeag, 379.  
 Navigation laws foster piracy, 251-253.  
 New England, and other American colonies, 115.  
 Newport Bridge Company, the, 64.  
 New York, Synod of, 226; Mr. Davies and, 230.  
 Nicholson, Gov. Francis, quoted, 204, 511.  
 Non-freemen, privileges extended, 425 (foot-note).  
 North Carolina, the constitutional beginnings of, 105-169; sources of information on, 104; proprietary government of, 105; beginning of constitution of, 106; Governor of, 107; development of civil liberty in, 108; grievances in, 109; economical condition of, 110-111; landed aristocracy in, 111; settlers in, 111; source of the constitution of, 113-125; and Maryland, 115; form of government of, 115; the judicial system in, 161-167; finances in, 167; miscellaneous officers in, 168-169; notorious resort for pirates, 286-290, 295, 301, 304; officials of, and Thatch, 311, 316-319.  
 Northy, Sir Edward, quoted, 179.

## O

Occum, Sampson, 515.  
 Ohio, reaction against public works in, 11-12; constitution, quoted, 12; constitution and railroad, 18; courts and public improvements, 28; railroad problems in, 29; acts concerning the railway, 42, 44, 46.  
 "Ohio river bridge act," the, 33.

## P

Palatinate, the, franchise, 117-123; jurisdiction, 118; courts, 119; function of the government, 120; officers, 120-121; legislature,

121; system in America, 123-125; difference between, in Durham, and in N. C., 125.  
 Palatine, of Durham, 117; county in America, 123-125.  
 Papists, the, in Virginia, 231.  
 Parliamentary commissioners, church regulations and, 187.  
 Penn, William, quoted, 115; policy relating to land purchase, 477.  
 Peyton, "History of Augusta County," by, quoted, 209.  
 Philadelphia, Synod of, 211.  
 Piracy, English law of, 241-243; Jamaica law against, 254-257.  
 Pirates, the Carolina, and colonial commerce, 241-370; introduction, 241-244; English law against, 241-243; Landonière's crew, 245; in the colonies, 248-250; akin to privateers, 250; fostered by the English navigation laws, 251-253; Jamaica law against, 254-257; act of 1687 against, 258; act of 1698 against, 276, 277; statute against, 278-279; extermination of, in Carolina, 281; pardon of, by King William, 282; and public sentiment, 283, 284; pardon by George I., 302. *See* Bonnet, Moody, Thatch, Vane, Worley.  
 Plantation, in Mass., management of, 380.  
 Plymouth Colony, the, and reservation system, 479, 480; representation and suffrage in, 436-451; charter of, 436; development of representative body in, 438-439; representative system of, 440; power of the General Court, 441; admission of inhabitants, 441-444; narrowing of the suffrage, 445; power of freemen in, 445-446; church-membership and citizenship in, 447, 448; freemen and non-freemen in, 449; method of election in, 449 and foot-note; and Mass. governments, 450; union with the other New England colonies, 451.  
 "Praying Indians" organized, 515.  
 Presbyterians, in Va., 208-233; Gov. Gooch and, 208, 215; in the Valley of Va., 210; of Hanover,

216; in Accomac, 220; Lords Commissioners of Trade and, in Va., 227; increase of, in Va., 231.  
 Proprietary colony, 113.  
 Proprietors, the Lords, legal status of, 126-130; of Carolina, 126; executive powers of, 127; as tenants-in-chief, 128; of Maryland, 129; in N. C., 129; and government, 131-139; in the N. C. constitution, 140.  
 Protestant dissenters in Va., the history of, 175.  
 Provisional government, church affairs and, in Va., 187, 188.  
 Puritans, the Quakers and, in Va., 196; and the Separatists, 377; object of colony, 381; and Governor, 393; and other sects, 423; removed to Maryland, 184 (foot-note); and slavery, 504.

## Q

Quakers, the, in Virginia, 187-202; first appearance of, in Virginia, 187; law against, 188-190; House of Burgesses and, 192; in Accomac, 194; Gov. Berkeley and, 195; Puritans and, 196; military service and, 200; in Nansemond, 201; in the Plymouth Colony, 448.

## R

Railroad, the construction of, and municipal activity, 7; and local administration, 8.  
 Railway, the necessity of the, 10-21; the trustees of the Cincinnati, 21; construction of, 35; theory of construction of, 60; constitutionality of the legislation, 60-61; and the development of Cincinnati, 79; and the American cities, 80.  
 Randolph, Edward, quoted, 416, 433.  
 Redfield, *Judge*, on Walker *vs.* Cincinnati, 61.  
 Reeves, *Dr. J. S.*, on "The International Beginnings of the Congo Free State," 527-615.

"Resident's oath," 396.  
 Rhett, *Col. W.*, expedition against Bonnet, 327-334; Bonnet retaken by, 338.  
 Rhode Island Plantation, the, 457.  
 Rider, *Sir Dudley*, on the rights of Dissenters, 226.  
 Roan, the *Rev. John*, 213; persecuted, 216.  
 Robinson, the *Rev. Wm.*, 213.  
 Rodgers, *Mr.*, 221; General Court of Va. and, 222.  
 Rogers, *Capt. W.*, exterminates pirates, 304.  
 Rolin-Jacquemyns, *M. G.*, definition of the Congo State, 593.  
 Rosebery, *Lord*, on the Congo State. 608; and King Leopold, 609.

## S

Salisbury, *Lord*, on the Congo Free State, 608.  
 Sandys, *Sir Edwin*, and Indian education, 509.  
 Scarborough, *Col. Edmund*, cited, 193.  
 Schurman, *President J. G.*, on Dr. Merriam, 112.  
 Scott, *Chief Justice*, and the Ferguson Acts, 31.  
 Shaftesbury, *Lord*, 131.  
 Shepard, *Thos.*, letter quoted, 491.  
 Sherwood, *Dr. Sidney*, a memorial of L. S. Merriam by, 111.  
 Slave-trade, the, provisions of treaty on, 534; of Congress of Vienna, 534; of Convention at Lisbon, 534; declared a crime, 534; discontinuance of, 535, 536.  
 Smith, *John*, and the Iroquois, 470.  
*Société Anonyme Belge*, 603.  
 South Carolina, name first appears, 286; laws against piracy, 290-293; Indian outbreak in, and piracy, 293-301; Johnson's administration, 301-365; regular trial of pirates, 336; Proprietary government overthrown, 364, 365; Nicholson's administration, 365-367; Johnson's second administration, 368, 369.  
 "South Sea Indians," 479.

Sovereignty, defined, 594 (foot-note), 595.  
 "Sow Business," the, 411-413; and General Court, 413.  
 Spotswood, *Governor*, 108, 176; quoted, 179, 205; conflict between the Quakers and, 200-201; and expedition against Thatch, 312-314; on Indian education, 512.  
 Stanley, *H. M.*, "Congo," quoted, 592; national states, 593.  
 Stevens, *Wm.*, 456.  
 St. Louis, population of, 10 (foot-note).  
 Strauch, *Col.*, quoted, 592.  
 Supreme Court of Ohio, and the railway, 53.

## T

Table, of the liabilities of Cincinnati, 74; of interest, 75; of the rental charge, etc., 76; of the freight rates of the Ohio Railway, 82.  
 Taft, *Judge*, and railroad construction, 28.  
 Tennessee, the General Assembly of, and the Cincinnati Southern Railroad, 25-26.  
 Thatch, *E.*, "Black-Beard," 305 (foot-note), 305-314; depredations of, 305-311; North Carolina officials and, 311, 316-319; expedition against, 312-314; trial of, 314-316; cruise of, with Bonnet, 323.  
 Toleration Act, in Virginia, 196-197, 224.  
 Trader, and civilization, 482.  
 Trading-house system, 492-502; in Mass. Bay Colony, 493; in Pa., 494; in Va., 495; in S. C., 495; and the Presidents of the U. S., 496; position for the houses, 497; advantages of, 499; failure of, 499; trading-house and military post, 500; goods used in the houses, 501.  
 Treaties, between England and Portugal, 533-535, 545.  
 Treaty, between France and Portugal, 530-533.

- Trott, *Judge*, Bonnet sentenced by, 341, 343, 344.  
 Trust, the Ohio Railway, fund of, 68.  
 Trustees of sinking fund, 51, 58; and lessees of the railway, 56.

## U

- United Colonies, the, and slavery, 504.  
 United States, the, municipal activity in, 7-8.

## V

- Van Eetwalde, *M.*, letter quoted, 632.  
 Vane, C., depredations of, 304, 327, 328.  
 Vestrymen, law for the election of, 180; power of, 179, 180.  
 Vice-Admiralty Court, reorganization of, 298-301; trial of Bonnet *et al.*, 338-344; on the capture of private vessels, 361-363; records of, 357-359.  
 Vienna, Declaration of, 534.  
 Virginia Assembly, the, and Indians, 482; and Indian trade, 487.  
 Virginia Company of London, 183.  
 Virginia, Protestant Dissenters in, 175; Church of England and Church of, 175-176; Quakers in, 175, 188-190; Presbyterians in, 175, 208-233; triumph of Dissenters over the Established Church in, 175; religious toleration in, 175, Protestant Reformation and, 176; religious questions and the General Assembly of, 177; Bishop of London and, 177; Governor and Commissary in, 177; Governor and the Church of, 178; theories on the head of the Church of, 178; power of vestries in, 179-180; vestries and the Governors of, 180-182; various elements of population of, 182-186; Puritans in, 185; laws against Dissenters in, 186; law against Quakers in, 187; conflict of Protestant Dissenters with the government of, 187-202; first appearance of Quakers in, 187; Church affairs and the Provisional government in, 187; Church regulation and Parliamentary Commissioners in, 187; Baptists in, 192; Toleration Act in, 196-197, 224; number of Dissenters in, 198; first licensed Dissenter minister in, 199; Huguenots and Germans in, 203-207; Indians and colonists of, 205; Germans and the Church of, 206; Presbyterians in, 208-233; Presbyterians in the Valley of, 210; Mr. Whitefield in, 212, 219; Mr. Rodgers and General Court of, 222; increase of Presbyterian ministers in, 231; French and Indian War in, 231; solidification of the people of, 232; clergy *versus* government and people in, 232-233.

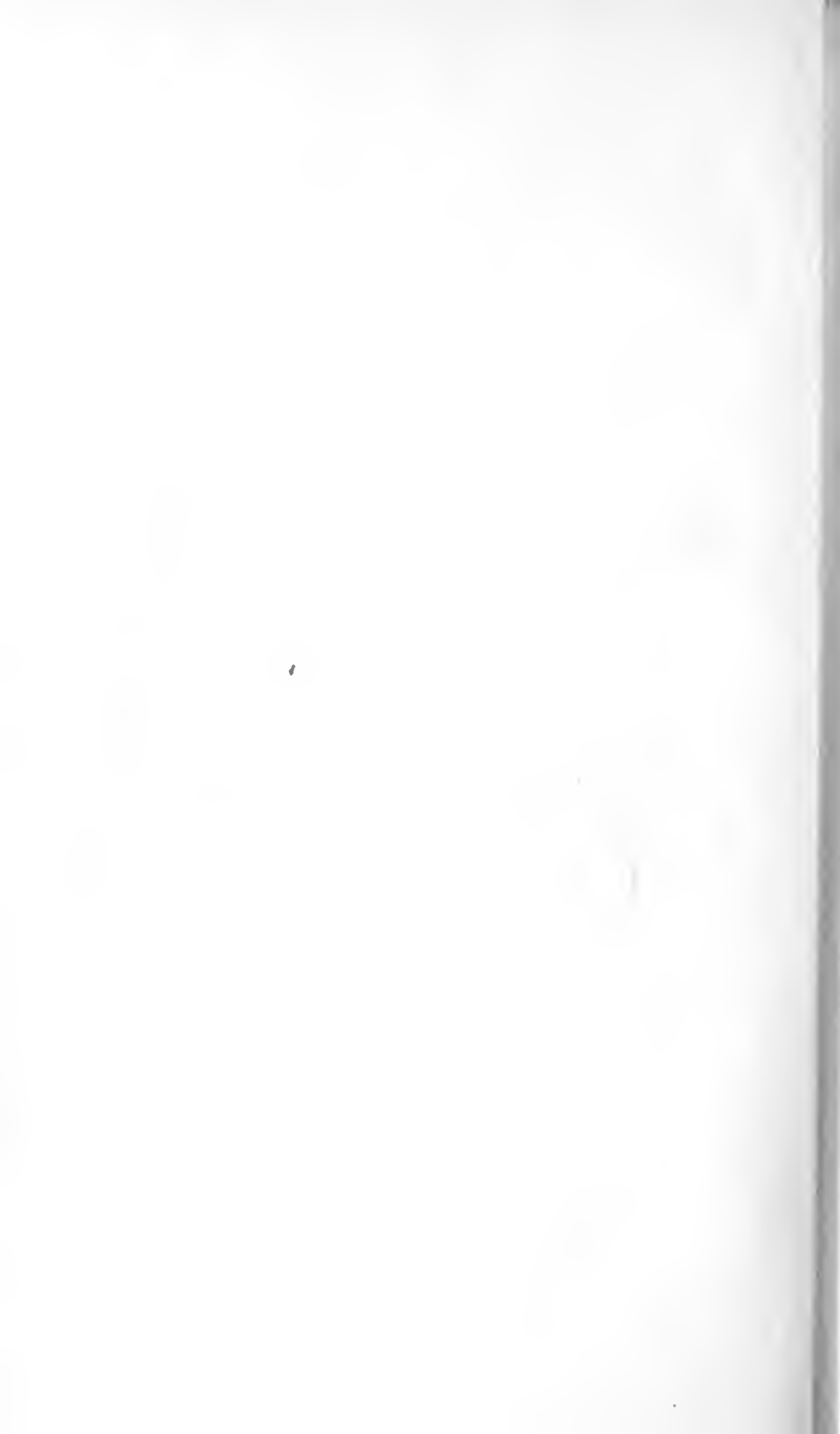
## W

- Walker, *Gen.*, on the Iroquois, quoted, 470.  
 Walker, Henderson, 145.  
 Walker *vs.* Cincinnati, 61, 62.  
 Washington, *President*, and Indian trade, 496.  
 Watkins, Thomas, prosecuted, 217.  
 Weeden, *Mr.*, quoted, 475.  
 Wheelwright, quoted, 423.  
 Whitefield, *Mr.*, in Virginia, 212, 219.  
 William and Mary College, 510; and Indian education, 511.  
 William the Conqueror, and landed aristocracy, 117.  
 Winslow, *Governor*, quoted, 476, 513; and freemen, 421 (foot-note).  
 Winston, Isaac, case of, 217; decision of the case, 218.  
 Winthrop, *Governor*, 503.  
 Winthrop, John, 415.  
 Wise, the *Rev.* John, 433.  
 Worley, depredations, 356; taken by the expedition, 353-355; error of historians concerning, 357, 358.  
 Wraxall, *Secretary*, 490, 518.











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